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REPORTS

OF

CASES

ARGUED AND DETERMINED IN

THE COURT OF QUEEN'S BENCH,

AND

THE COURT OF EXCHEQUER CHAMBER

ON APPEAL FROM THE COURT OF QUEEN'S BENCH.

WITH TABLES OF THE NAMES OF THE CASES REPORTED AND CITED,
AND AN INDEX OF THE CONTENTS.

BY

WILLIAM MAWDESLEY BEST, OF GRAY'S INN,

AND

GEORGE JAMES PHILIP SMITH, OF THE INNER TEMPLE,
ESQES., BARRISTERS AT LAW.

VOL. I.

CONTAINING THE CASES OF

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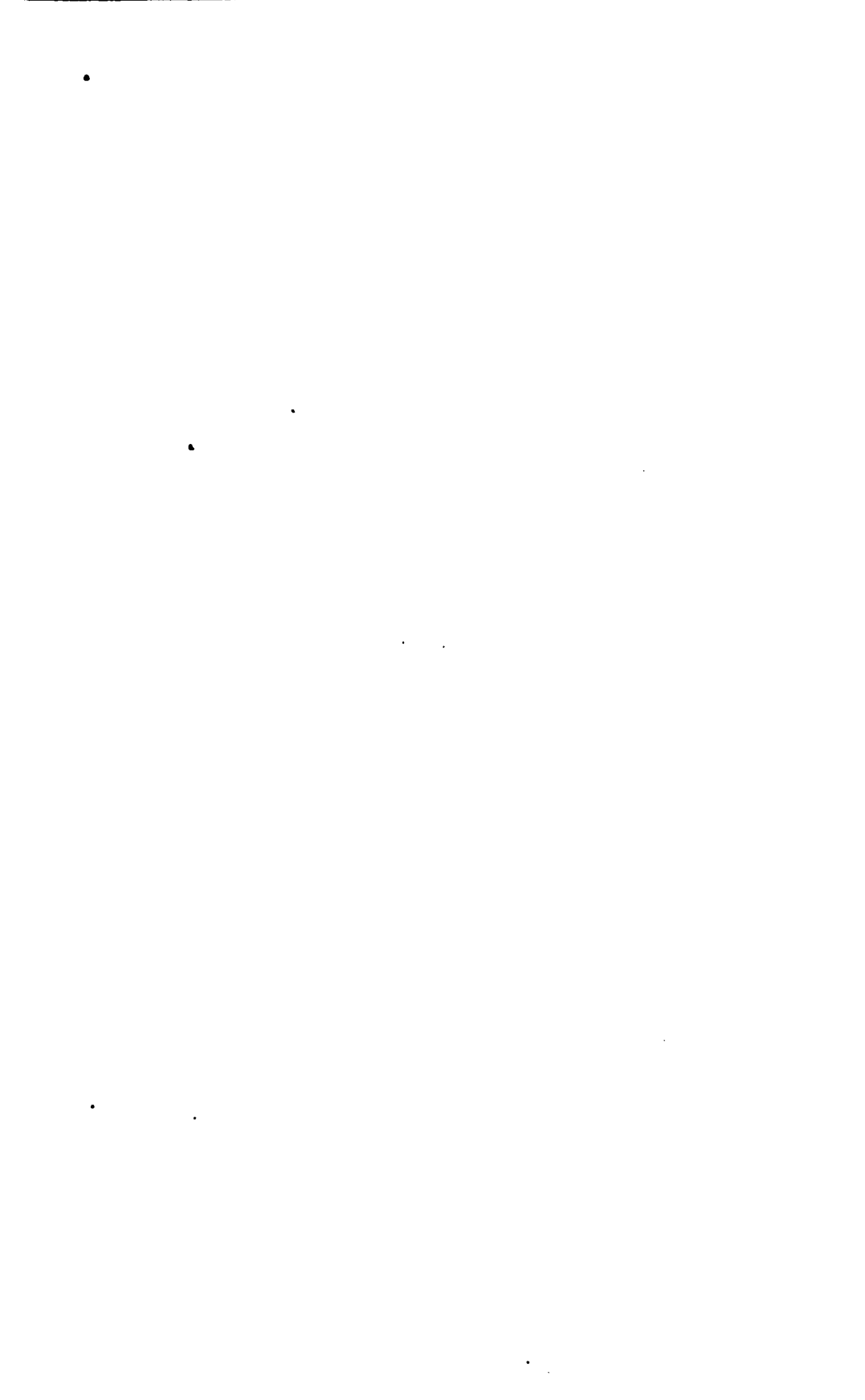
**The Right Hon. Sir ALEXANDER JAMES EDMUND
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A

TABLE

OF

THE NAMES OF CASES

REPORTED IN THIS VOLUME.

A.		Page		Page
Accidental Death Insurance			Burmington, Overseers of,	
Company, Braunstein v.	782		Wheeler v.	709
Alexander, Zwilchenbart v.	284		Burness, Behn v.	877
Allen, Nicholl v.	916			
Amis, Witt v.	109		C.	
Atkinson, Tweddle v.	393			
Attenborough, Lamb v.	831		Candlish v. Simpson	357
			Carr v. Cooper	230
			— v. Royal Exchange As-	
			surance Company	956
B.			Chaytor, Pease v.	658
Bartlett v. Wells	836		Clark, Bellingham v.	332
Bartley v. Hodges	375		Cook v. Wright	559
Behn v. Burness	877		Cooper, Carr v.	230
Bellingham v. Clark	332		Crawford, Wiley v.	253
Blackett v. Bradley	940		Cureton v. The Queen	208
Bond v. Rosling	371		Cusack v. Robinson	299
Braunstein v. Accidental Death				
Insurance Company	782		D.	
Bristol and Exeter Railway				
Company, Garton v.	112			
Brompton &c. Waterworks				
Company (In re), Young v.	675		Davis, Pow v.	220

E.		L.	
	Page		Page
Everett, Jackson <i>v.</i>	857	Lamb <i>v.</i> Attenborough	831
		Lee <i>v.</i> Griffin	272
		Lewis, St. Luke's, Middlesex, Vestry of, <i>v.</i>	865
F.		Llangeinwen, Overseers of, Williams <i>v.</i>	699
Faulkner, Potter <i>v.</i>	800	Lloyd, Tunstall <i>v.</i>	95, 96
		London, Brighton and South Coast Railway Company, Moody <i>v.</i>	290
G.		Lucas, Tamvaco <i>v.</i>	185
Garton <i>v.</i> Bristol and Exeter Railway Company	112		
Graham, Ogden <i>v.</i>	773	M.	
Great Indian Peninsula Rail- way Company <i>v.</i> Saunders	41	Mackley <i>v.</i> Pattenden	178
Greenroyd, Wright <i>v.</i>	758	Mansergh, In re	400
Griffin, Lee <i>v.</i>	272	Marples <i>v.</i> Hartley	1
		Mellors <i>v.</i> Shaw	437
H.		Memoranda	640. 824
Hallaghan, Romelio <i>v.</i>	279	Mirehouse, Sommerville <i>v.</i>	652
Harris, Paterson <i>v.</i>	336	Moody <i>v.</i> London, Brighton and South Coast Railway Company	290
Harrod <i>v.</i> Worship	381		
Hartley, Marples <i>v.</i>	1	N.	
— <i>v.</i> Shemwell	1	Nazer <i>v.</i> Wade	728
Herbert, Ex parte	825	Nicholl <i>v.</i> Allen	916
Heys <i>v.</i> Tindall	296		
Hodges, Bartley <i>v.</i>	375	O.	
Holland <i>v.</i> Russell	424	Ogden <i>v.</i> Graham	773
I.		P.	
Irish Peat Company <i>v.</i> Phil- lips	598	Paterson <i>v.</i> Harris	336
		Patrington, Surveyors of High- ways of, Sunk Island Turn- pike Road, Trustees of, <i>v.</i>	747
J.		Pattenden, Mackley <i>v.</i>	178
Jacklin, Willsmer <i>v.</i>	641	Pearson <i>v.</i> Spencer	571
Jackson <i>v.</i> Everett	857	Pease <i>v.</i> Chaytor	658
— <i>v.</i> Thomason	745		
Jolly <i>v.</i> Wimbledon and Dork- ing Railway Company	807		

TABLE OF CASES REPORTED.

vii

	Page		Page
Phillips, Irish Peat Company v.	598	Royal Exchange Assurance Company, Carr v.	956
Potter v. Faulkner	800	Russell, Holland v.	424
Pow v. Davis	220		
		S.	
R.		St. Luke's, Middlesex, Vestry of, v. Lewis	865
Regina v. Allen	850	Saunders, Great Indian Pen- insula Railway Company v.	41
— v. Birmingham, Over- seers of	763	Shaw, Mellors v.	437
— v. Birmingham Water- works Company	84	Shemwell, Hartley v.	1
— v. Boyes	311	Sikes v. Wild	587
— v. Bramley, Inhabit- ants of	732	Simpson, Candlish v.	357
— v. Brighton, Inhabit- ants of	447	Smith, Ex parte	412
— v. Cambridge Union, Guardians of	61	Sommerville v. Mirchouse	652
— v. Charlesworth	460	Spencer, Pearson v.	571
— Cureton v.	208	Stephenson v. Taylor	95, 101
— v. Elrington	688	Sunk Island Turnpike Road, Trustees of, v. Patrington, Surveyors of Highways of	747
— v. Huddersfield, Over- seers of	961		
— v. Kirby	647	T.	
— v. Licensed Victual- lers' Society	71	Tamvaco v. Lucas	185
— v. Pickford	77	Taylor, Stephenson v.	95, 101
—, on the prosecution of St. John, Southwark, Di- rectors of, v. Rendle	54	Thomason, Jackson v.	745
— v. Ruyton, Inhabitants of	534	Tindall, Heys v.	296
— v. St. John, West- gate, Burial Board of	679	Toxteth Park, Guardians of, v. Toxteth Park, Local Board of Health of	167
— v. St. Luke's, Chelsea, Vestry of	903	Tunstall v. Lloyd	95, 96
— v. St. Mary, Arches, Exeter, Overseers of	890	Turner, Young v.	550
— v. Southampton, Com- missioners of Port of	5	Tweddle v. Atkinson	393
— v. Willmott	27		
Robinson, Cusack v.	299	W.	
Romelio v. Hallaghan	279	Wade, Nazer v.	728
Rosling, Bond v.	371	Walmsley, Ex parte	81
		Wells, Bartlett v.	836
		Wild, Sikes v.	587
		Wheeler v. Burmington, Over- seers of	709

Wiley v. Crawford	Page 253		
Williams v. Llangeinwen, Overseers of	699	Y.	Page
Willsmer v. Jacklin	641	Young v. Brompton & c. Water- works Company (In re)	675
Wimbledon and Dorking Railway Company, Jolly v.	807	—— v. Turner	550
Witt v. Amis	109		
Wooldridge, Ex parte	844	Z.	
Worship, Harrod v.	387		
Wright, Cook v.	559		
—— v. Greenroyd	758	Zwilchenbart v. Alexander	234

TABLE OF CASES CITED.

A.

	Page
Abraham v. Reynolds -	5 <i>H. & N.</i> 143 - 804
Ackerley v. Parkinson -	3 <i>M. & S.</i> 411 - 656
Adams v. Ready -	6 <i>H. & N.</i> 261 - 859
Allen's Case -	7 <i>Jur. N. S.</i> 234 - 405
Anderson, In re -	7 <i>Jur. N. S.</i> 122 - 406
Arkle v. Henzell -	8 <i>E. & B.</i> 828 - 258
Ariett v. Ellis -	7 <i>B. & C.</i> 346 - 949
Ashpitel v. Sercombe -	5 <i>Exch.</i> 147 - 622
Ashworth v. Stanwix -	30 <i>L. J. Q. B.</i> 183; 7 <i>Jur. N. S.</i> 467 - 440
Atkinson v. Bell -	8 <i>B. & C.</i> 277 - 274
Atlee v. Backhouse -	3 <i>M. & W.</i> 633 - 568
Auriol v. Mills -	1 <i>Smith L. C.</i> 681 - 180
Avery v. Bowden, in error -	6 <i>E. & B.</i> 953, 962 - 443

B.

Backhouse, appt., Churchwardens of	9 <i>C. B. N. S.</i> 315 - 666
Bishopwearmouth, respts.	3 <i>B. & A.</i> 153 - 949
Badger v. Ford -	1 <i>Park on Insurance</i> , 8th ed. p. 116 208
Baillie v. Moudigliani -	14 <i>M. & W.</i> 465 - 565
Baker v. Walker -	2 <i>B. & C.</i> 37 - 305
Baldry v. Parker -	8 <i>Q. B.</i> 208 - 766
Baron Bode's Case -	6 <i>E. & B.</i> 675, 679; 25 <i>L. J.</i> Q. B. 349 - 883, 885
Barker v. Windle -	1 <i>Cr. & M.</i> 439 - 579
Barlow v. Rhodes -	13 <i>Q. B.</i> 393 - 664
Barton v. Bricknell -	3 <i>H. & N.</i> 387 - 111
— v. Gainer -	3 <i>Macq.</i> 266 - 441, 803
Bartonshill Coal Company, appts., Reid, respt.	5 <i>T. R.</i> 411 - 951
Bateson v. Green -	

			Page
Baxendale v. Eastern Counties Railway Company	4	C. B. N. S. 63	- 160
Company v. Great Western Railway Company	5	C. B. N. S. 336	- 153
pany v. North Devon Railway Com-	30	L. T. 133; 3 C. B. N. S. 324	154
Beaudeley v. Brook	-	Cro. Jac. 189	- 579
Beaumont v. Brengeri	-	5 C. B. 301	- 308
Beck v. Beverly	-	11 M. & W. 845	- 284
Becke, Ex parte	-	3 B. & Ad. 704	- 65
Beckham v. Drake	-	2 H. L. Ca. 596	- 182
— v. Knight	-	7 Dowl. P. C. 409	- 476
Bell v. Gardiner	-	4 M. & Gr. 11	- 567
— v. Waldron	-	9 Jur. 510	- 860
Bilbie v. Lumley	-	2 East. 469	- 430
Bircham v. Walker	-	1 L. T. N. S. 191	- 285
Bird v. Holbrook	-	4 Bing. 628	- 805
Birmingham, Bristol and Thames Junction Railway Company v. Locke	1	Q. B. 256	- 635
Bishop, Ex parte	-	9 C. B. N. S. 150	- 827
Blyth v. Smith	-	5 Mun. & G. 405	- 226
Bone v. Ekless	-	5 H. & N. 925	- 428
Boone v. Eyre	-	1 H. Bl. 273, note	- 883
Booth v. Coldman	-	1 E. & E. 414	- 284
Bourdillon v. Dalton	-	1 Peake N. P. C. 238	- 181
Bourne v. Mason	-	1 Ventr. 6	- 396
Bowen v. Fox	-	10 B. & C. 41	- 257
Bowman v. Blyth	-	7 E. & B. 26	- 64
Bratt v. Ellis	-	Sugd. V. & P. App. 7	- 590
Brett v. Cumberland	-	Cro. Jac. 521	- 937
Bristol Poor, Governors of, v. Wait	-	5 A. & E. 1.	- 174
Bristow v. Eastman	-	1 Esp. 172	- 838
Broadbent v. Wilks	-	Willes, 360; 2 Str. 1224	- 949
Brook v. Brook	-	7 Jur. N. S. 422	- 454
Brown, appt., Nicholson, respt.	-	5 C. B. N. S. 468	- 366
— v. Overbury	-	11 Exch. 715	- 793
Bryan v. Lewis	-	Ry. & M. 386	- 592
Buller v. Harrison	-	Cowp. 565	- 428
— v. Fisher	-	3 Esp. 67	- 346
Burnes v. Pennell	-	2 H. L. Ca. 497	- 621
Burton v. Reeve	-	16 M. & W. 307	- 374
Bushell's Case	-	Vaugh. 135; T. Jones, 13	- 667
Butler v. Gastrill, alias Gastrell	-	Gilb. Ca. Eq. 156; Bunb. 145; 1 Com. 318	- 455
Bythessea v. Bythessea	-	17 Jur. 645; affirmed 23 L. J. N. S. Chanc. 1004	555, 556

C.

Campbell v. Smart	-	5 C. B. 196	- 730
— v. The Queen	-	11 Q. B. 799. 814	- 477
Candlish v. Simpson	-	p. 367	- 669
Cane v. Chapman	-	5 A. & E. 647	- 22
Carden v. General Cemetery Company	-	7 Dowl. P. C. 425	- 476

TABLE OF CASES CITED.

xi

		Page
Carne v. Malins	- 6 <i>Exch.</i> 803	- 730
— v. Nicoll	- 1 <i>Bing. N. C.</i> 430	- 767
Carter v. Boehm	- 3 <i>Burr.</i> 1905	- 429
Cartwright v. Glover	- 2 <i>Giffard</i> , 620	184, n.
Cassamajor v. Strode	- 8 <i>Jur.</i> 14	- 554
Chambers v. Bernasconi	- 1 <i>C. M. & R.</i> 347	- 765
Chaplin v. Rogers	- 1 <i>East</i> , 192	- 304
Chapman v. Benson	- 5 <i>C. B.</i> 330; 2 <i>H. L. Ca.</i> 696	- 48
Cheltenham and Great Western Railway Company v. Daniel	- } 2 <i>Q. B.</i> 281	- 621
Clarke v. Batters	- 1 <i>K. & J.</i> 242	- 266
— v. Cobley	- 2 <i>Cox Eq. Cas.</i> 173	- 838
— v. Dickson	- <i>E. B. & E.</i> 148	- 621
Clay v. Yates	- 1 <i>H. & N.</i> 73	- 273
Clayton v. Corby	- 5 <i>Q. B.</i> 415	- 949
Clement v. Beard	- 5 <i>Mod.</i> 448, cited in 1 <i>Com.</i> 320	456
Clipsham v. Vertue	- 5 <i>Q. B.</i> 625	- 883
Cock v. Gent	- 12 <i>M. & W.</i> 234	- 957
Coggs v. Bernard	- 2 <i>Ld. Raym.</i> 909	- 144
Colborne v. Stockdale	- 1 <i>Str.</i> 493	- 216
Colby v. Hunter	- <i>Mood. & M.</i> 81	- 883
Collen v. Wright	- 7 <i>E. & B.</i> 301; 8 <i>E. & B.</i> 647	225
Conway and Lynch v. The Queen	- 7 <i>Irish Law Rep.</i> 149	- 462
Cook's Case	- 13 <i>How. St. Tr.</i> 324	- 487
Cooper v. Parker	- 15 <i>C. B.</i> 822	- 568
Copeland v. Stephens	- 1 <i>B. & A.</i> 593	- 180
Cornfoot v. Fowke	- 6 <i>M. & W.</i> 358	- 590
Cornish v. Hockin	- 1 <i>E. & B.</i> 602	- 731
Cory v. Gertcken	- 2 <i>Mudd.</i> 40	- 838
Cox v. Premtice	- 3 <i>Mau. & S.</i> 344	- 428
Cranston v. Marshall	- 5 <i>Exch.</i> 395	- 884
Croockewit v. Fletcher	- { 1 <i>H. & N.</i> 893; 26 <i>L. J. Exch.</i> 153	- 884
Crouch v. London and North Western Railway Company	- } 14 <i>C. B.</i> 255	- 157
Culverwell v. Nugee	- 15 <i>M. & W.</i> 559	- 730

D.

Dails v. Lloyd	- 12 <i>Q. B.</i> 531	- 430
Dallman v. King	- 4 <i>Bing. N. C.</i> 105	- 790
Davies v. Humphreys	- 6 <i>M. & W.</i> 153	- 766
— v. The King	- 10 <i>B. & C.</i> 89	- 217
— v. Pierce	- 2 <i>T. R.</i> 53	- 765
Degg v. Midland Railway Company	- 1 <i>H. & N.</i> 773	- 802
Delamere's, Lord, Case	- 11 <i>How. St. Tr.</i> 510. 559. 561	492
Denn d. Radclyffe v. Bagshaw	- 6 <i>T. R.</i> 512	- 555
Denny v. Ashwell	- 1 <i>Str.</i> 53	- 457
Deposit and General Life Insurance Company v. Ayscough	- } 6 <i>E. & B.</i> 761	- 621
De Bode's, Baron, Case	- 8 <i>Q. B.</i> 208	- 766
De Pothonier v. De Mattos	- <i>E. B. & E.</i> 461	- 839
Dimech v. Corlett	- 12 <i>Mod. P. C. C.</i> 199	- 883

		Page
Doe d. Kinglake v. Beviss	- 7 C. B. 456	- 766
— d. Wilkinson v. Goodier	- 10 Q. B. 957	- 819
— d. Baggalley v. Jones	- 1 Campb. 367	- 764
— d. Welsh v. Langfield	- 16 M. & W. 497	- 767
— d. Garrod v. Olley	- 12 A. & E. 481	- 819
— d. Hindly v. Rickarby	- 5 Esp. 4	- 764
— d. Pearson v. Ries	- 8 Bing. 178	- 373
— Lessee of Reece v. Robson	- 15 East. 32	- 766
— d. Cannon v. Ruecastle	- 8 C. B. 876	- 554
— d. Snell v. Tom	- 4 Q. B. 615	- 819
Drury v. Macnamara	- 5 E. & B. 612	- 226
Duff v. Mackenzie	- { 26 L. J. C. P. 313; 3 C. B. N. S. 16	- 48
Dutton and Wife v. Poole	- { 2 Lev. 210; 1 Vent. 318; T. Raym. 302	- 395
Dynen v. Leach	- 26 L. J. N. S. Exch. 221	- 444

E.

Edinburgh, Perth and Dundee Railway Company v. Philip	- { 2 Macq. 514	- 930
Edwards v. Baugh	- 11 M. & W. 641	- 564
— v. Hodding	- 5 Taunt. 815	- 430
Edwards v. Ronald	- 1 Knapp P. C. C. 259	- 377
Ellerton v. Gastrell	- { 1 Com. 318; Gilb. Ca. Eq. 156; Bunb. 145	- 455
Elmore v. Stone	- 1 Taunt. 458	- 304
Esposito v. Bowden	- 4 E. & B. 963	- 194

F.

Farina v. Home	- 16 M. & W. 119	- 305
Fawcus v. Sarsfield	- 6 E. & B. 192	- 348
Fenwick's, Sir John, Case	- 13 How. St. Tr. 538	- 324
Fergusson v. Spencer	- { 2 Scott. N. R. 229; 1 Man. & Gr. 987	- 379
Ferrar's Case	- T. Raym. 84	- 479
Fisher v. Ronalds	- 12 C. B. 762	- 327
Fletcher v. Calthrop	- 6 Q. B. 880	- 216
Flureau v. Thornhill	- 2 W. Bl. 1078	- 590
Forman v. Wright	- 11 C. B. 481	- 564
Franklin v. Beesley	- 1 E. & E. 425	- 285
Freeman v. Taylor	- 8 Bing. 124	- 883

G.

Galvanized Iron Company v. Westoby	- 8 Exch. 17	- 622
Gardiner's Case	- J. Kelyn. 46	- 486
Garnett v. Ferrand	- 6 B. & C. 611	- 667
Garton v. Bristol and Exeter Railway Company	- { 6 C. B. N. S. 639	- 147

TABLE OF CASES CITED.

xiii

		Page
Garton v. Bristol and Exeter Railway Company	4 <i>H. & N.</i> 33; 5 <i>Jur. N. S.</i> 1172; 7 <i>Jur. N. S.</i> 173	- 152
Glabholm v. Hays	2 <i>Man. & Gr.</i> 257	- 885
Gleadow v. Atkin	1 <i>C. & M.</i> 410	- 767
Goddard v. Smith	6 <i>Mod.</i> 261	- 852
Goodright v. Wright	1 <i>Str.</i> 33	- 232
Goodwin v. Noble	8 <i>E. & B.</i> 587	- 179
Gorrissen v. Perrin	2 <i>C. B. N. S.</i> 681	- 884
Gould's Case	18 <i>How. St. Tr.</i> 415, note; 3 <i>Chitty's Burn's Justice</i> , 974	- 483
Grafton v. Armitage	2 <i>C. B.</i> 336	- 274
Graham v. Van Diemen's Land Company	11 <i>Exch.</i> 101	- 181
Grant v. Gould	2 <i>H. Bl.</i> 69	- 404
Gray v. Gutteridge	3 <i>Car. & P.</i> 40	- 430
Green v. Greenbank	2 <i>Marsh.</i> 485	- 837
Gulliver v. Gulliver	1 <i>H. & N.</i> 174	- 839

H.

Hackney and Lamberhurst Tithe Commutation Rent Charges Case	<i>E. B. & E.</i> 1	- 704. 718
Hadley v. Baxendale	9 <i>Exch.</i> 341	- 590
Hains, <i>alias</i> Haines, v. Jeffell, <i>alias</i> Jesscott, Jescott, Jeffreys	1 <i>Ld. Raym.</i> 68; 5 <i>Mod.</i> 168; <i>Comb.</i> 356; 1 <i>Com.</i> 2	- 451
Hall v. Janson	4 <i>E. & B.</i> 500	- 193
Hamond v. Howell	1 <i>Mod.</i> 184; 2 <i>Mod.</i> 218	- 667
Hanscomb's Case	2 <i>Hale P. C.</i> ch. 41. 295	- 485
Hanson v. Armitage	5 <i>B. & A.</i> 557	- 307
— v. Stevenson	1 <i>B. & A.</i> 303	- 181
Harman v. Tappenden	1 <i>East</i> , 555	- 656
Harrison v. Dr. Burwell	<i>Vaugh.</i> 208	- 457
Harris v. Ryding	5 <i>M. & W.</i> 60	- 951
Hart v. Bush	<i>E. B. & F.</i> 494	- 304
Hartfield, appts., Rotherfield, respts.	17 <i>Q. B.</i> 746	- 894
Hastings v. Wilson	<i>Holt. N. P. C.</i> 290	- 179
Hayne v. Rhodes	8 <i>Q. B.</i> 342	- 299
Heydon v. Smith	13 <i>Rep.</i> 67	- 949
Hibblewhite v. M'Morine	5 <i>M. & W.</i> 462	- 592
Higham v. Ridgway	10 <i>East</i> , 109	- 766
Hill v. Good	<i>Vaugh.</i> 302	- 457
— v. Manchester and Salford Waterworks Company	5 <i>B. & Ad.</i> 866	- 677
Hilton v. Earl Granville	5 <i>Q. B.</i> 701	- 948
Hinton v. Acraman	3 <i>C. B.</i> 737	- 476
Hitchcot v. Thornburrough	2 <i>Roll. Abr.</i> 337	- 722
Hoey v. McFarlane (In re)	4 <i>C. B. N. S.</i> 718	- 849
Holloway v. Rakes	<i>Cited in</i> 2 <i>T. R.</i> 53	- 764
Holmes v. Goring	2 <i>Bing.</i> 76	- 579
Hopkins v. Grazebrook	6 <i>B. & C.</i> 31	- 590
Horner v. Liddiard	1 <i>Hagg. Cons. Rep.</i> 337	- 452
Hotham v. East India Company	1 <i>T. R.</i> 638	- 792
Howard v. Bartlett	<i>Hob.</i> 181	- 455
Humphries v. Brogden	12 <i>Q. B.</i> 739	- 950
Hunt v. Hecht	8 <i>Exch.</i> 814	- 305
Hunter v. Gibbons	1 <i>H. & N.</i> 459	- 839

			Page
Hurst v. Usborne	-	18 <i>C. B.</i> 144	- 884
Hutchinson v. Stephens	-	1 <i>Keen</i> , 240	- 554
— v. York, Newcastle and Ber-	}	5 <i>Exch.</i> 343	- 804
wick Railway Company			
Hyde v. Mayor of Manchester	-	5 <i>De G. & Sm.</i> 249	- 819

J.

James v. Green	-	6 <i>T. R.</i> 228	- 368
— v. Plant, in error	-	4 <i>A. & E.</i> 749	- 579
Jauralde v. Parker	-	6 <i>H. & N.</i> 431	- 4
Jennings v. Rundall	-	8 <i>T. R.</i> 335	- 837
Johnson v. Johnson	-	3 <i>B. & P.</i> 162	- 590
— v. Midland Railway Company	-	4 <i>Exch.</i> 367	- 144
— v. Pie, alias Pye	}	1 <i>Keb.</i> 905. 913; 1 <i>Lev.</i> 169;	- 837
		1 <i>Sid.</i> 258	
Jones and Bever's Case	-	<i>J. Kelyn.</i> 52	- 486
— v. Dyke	-	<i>Sugd. V. & P. App.</i> 8	- 590
Jorden v. Atwood	-	<i>Owen</i> , 121	- 579

K.

Keen v. The Queen	-	10 <i>Q. B.</i> 928	- 65
Kemp v. Hurry	-	11 <i>Exch.</i> 47	- 264
Kendall v. Wilkinson	-	4 <i>E. & B.</i> 680	- 36
Kenyon v. Berthon	-	1 <i>Doug.</i> 12, n. (4)	- 883
King v. The Queen	-	14 <i>Q. B.</i> 31	- 478
Kinloch's Case	-	{ <i>Foster</i> , 16. 22; 18 <i>How. St. Tr.</i>	- 478
		395	

L.

Lambert v. Smith	-	11 <i>C. B.</i> 358	- 285
Lane v. Sir Robert Cotton	-	12 <i>Mod.</i> 472	- 803
Lawrence v. Knowles	-	5 <i>Bing. N. C.</i> 399	- 181
Lea v. Telfer	-	1 <i>Car. & P.</i> 146	- 644
Leary v. Patrick	-	15 <i>Q. B.</i> 266	- 664
Lees, Ex parte	-	{ <i>E. B. & E.</i> 828; 5 <i>Jur. N. S.</i>	- 406
		333	
Lewis v. Owen	-	4 <i>B. & A.</i> 654	- 379
Lichfield, Mayor of, v. Simpson	-	8 <i>Q. B.</i> 65	- 264
Linford v. Fitzroy	-	13 <i>Q. B.</i> 240	- 657
Liverpool Adelphi Loan Association v. Fairhurst	-	9 <i>Exch.</i> 422	- 838
Livie v. Janson	-	12 <i>East</i> , 648	- 47
Livingstone v. Whiting	-	15 <i>Q. B.</i> 722	- 430
London Grand Junction Railway Com-	}	2 <i>M. & G.</i> 606; 2 <i>Scott, N. R.</i>	- 623
pany v. Freeman		705	
— v. Graham	-	1 <i>Q. B.</i> 271	- 635
London, Mayor of, v. Long	-	1 <i>Campb.</i> 22	- 292
Longridge v. Dorville	-	5 <i>B. & A.</i> 117	- 568
Lovell v. Smith	-	3 <i>C. B. N. S.</i> 120	- 579
Lyme Regis, Mayor of, v. Henley	-	{ 1 <i>Bing. N. C.</i> 222; 2 <i>Cl. & F.</i>	- 936
		331	

TABLE OF CASES CITED.

xv

M.

		Page
McMahon v. Sir T. B. Leonard	- 5 <i>H. L. Ca.</i> 931	- 477
M'Swiney v. Royal Exchange Assurance	14 <i>Q. B.</i> 634. 696	- 350
Magnus v. Buttemer	- 11 <i>C. B.</i> 876	- 349
Mahala v. State	- 10 <i>Yerger</i> , 532	- 491
Maitland v. Chalie	- <i>Madd. & Geld.</i> 243	- 553
Manby v. Scott	- 1 <i>Sid.</i> 109	- 837
Mann's Case	- { <i>Moore</i> , 907; 4 <i>Leon.</i> 16; <i>Cro.</i> <i>El.</i> 228	- 457
Mansell's Case	- 1 <i>Anders. Rep.</i> 103	- 484
— v. The Queen	- 8 <i>E. & B.</i> 54	- 495
Marbalsea Case	- 10 <i>Rep.</i> 68 <i>b</i>	- 667
Marvin v. Wallis	- 6 <i>E. & B.</i> 726	- 308
Meadow's Case	- <i>Fost.</i> 76	- 489
Meredith v. Meigh	- 2 <i>E. & B.</i> 364	- 304
Metcalfe's Case	- 11 <i>Co.</i> 38	- 476
Metropolitan Counties and General Life Assurance Company v. Brown	- { 4 <i>H. & N.</i> 428	- 819
Middleton v. Crofts	- 2 <i>Atk.</i> 650	- 449
— v. Melton	- 10 <i>B. C.</i> 317	- 767
Midgley v. Richardson	- 14 <i>M. & W.</i> 595	- 950
Miller v. Miller	- 3 <i>P. W.</i> 356	- 111
Minter <i>ats.</i> Brett	- <i>Lill. Entr.</i> 489	- 477
Moore v. Shepherd	- 10 <i>Exch.</i> 424	- 957
Moon v. Durden	- 2 <i>Exch.</i> 22	- 762
Morris v. Edgington	- 3 <i>Taunt.</i> 24	- 579
Morton v. Tibbett	- 15 <i>Q. B.</i> 428	- 303
Moses v. Macferlan	- 2 <i>Burr.</i> 1005	- 429
Mountnoy v. Collier	- 1 <i>E. & B.</i> 630	- 766
Mumford v. Commercial Insurance Com- pany	- { 5 <i>Johns (U. S.) Rep.</i> 262	- 49
Murray v. Mann	- 2 <i>Exch.</i> 538	- 428

N.

Nelson v. Stocker	- 4 <i>De G. & Jones</i> , 458	- 840
New Brunswick and Canada Railway Company v. Muggeridge	- { 4 <i>H. & N.</i> 160. 580	- 622
Newton's Case	- 13 <i>Q. B.</i> 716	- 461
Nias v. Nicholson	- 2 <i>C. & P.</i> 120	- 283
Nicholson v. Bower	- 1 <i>E. & E.</i> 172	- 302

O.

Oates v. Hudson	- 6 <i>Exch.</i> 346	- 429
Odwin v. Forbes	- 1 <i>Buck Bank. Cas.</i> 57	- 378
Oldfield's Case	- <i>Noy</i> , 123	- 579
Oliver v. Fielden	- 4 <i>Exch.</i> 135	- 884
Ollive v. Booker	- 1 <i>Exch.</i> 416	- 883
Ormond v. Holland	- <i>E. B. & E.</i> 102	- 444
Osborn v. London Dock Company	- 10 <i>Exch.</i> 698	- 329

	P.	Page
Packer v. Welsted	- 2 <i>Sid.</i> 39. 111	- 579
Papendick v. Bridgwater	- 5 <i>E. & B.</i> 166	- 764
Parfitt v. Thompson	- 13 <i>M. & W.</i> 392	- 346
Parker v. Bristol and Exeter Railway Company	- 6 <i>Exch.</i> 702	- 429
— v. Great Western Railway Company	- 7 <i>M. & Gr.</i> 253	- 154
Peaceable d. Uncle v. Watson	- 4 <i>Taunt.</i> 16	- 764
People (The) v. Mather	- 4 <i>Wend.</i> 229	- 323
Percival v. Nanson	- 7 <i>Exch.</i> 1	- 767
Pheysey v. Vicary	- 16 <i>M. & W.</i> 484	- 579
Phillips v. Allan	- 8 <i>B. & C.</i> 477	- 378
— v. Huth	- 6 <i>M. & W.</i> 572	- 833
Pickford v. Grand Junction Railway Company	- 8 <i>M. & W.</i> 372	- 153
Pinnington v. Galland	- 9 <i>Exch.</i> 1	- 579
Poe, In re	- 5 <i>B. & Ad.</i> 681	- 405
Poole v. Hill	- 6 <i>M. & W.</i> 835	- 792
Pordage v. Cole	- 1 <i>Wms. Saund.</i> 319 l.	- 792
Potts v. Cumbridge	- 8 <i>E. & B.</i> 847	- 80
Pounsett v. Fuller	- 17 <i>C. B.</i> 660	- 590
Power v. Jones	- 1 <i>Str.</i> 445	- 233
Price v. Easton	- 4 <i>B. & Ad.</i> 433	- 395
— v. Hewett	- 8 <i>Exch.</i> 146	- 838
Priestley v. Fowler	- 3 <i>M. & W.</i> 1	440. 803
Priestly v. Hughes	- 11 <i>East.</i> 1	- 451
Proctor v. Hodgson	- 10 <i>Exch.</i> 824	- 579
Pugh v. Hookham	- 5 <i>C. & P.</i> 376	- 285

Q.

Quelin v. Moisson	- 1 <i>Knapp. P. C. C.</i> 266, note	- 377
-------------------	--------------------------------------	-------

R.

Rankin v. Weguelin	- 27 <i>Beav.</i> 309	- 111
Regina v. Adames	- 4 <i>B. & Ad.</i> 61	- 722
— v. Baptist Missionary Society	- 10 <i>Q. B.</i> 884	- 76
— v. Bedingham, Inhabitants of	- 5 <i>Q. B.</i> 653	- 541
— v. Belton	- 11 <i>Q. B.</i> 379	- 64
— v. Birmingham, Churchwardens of	- 8 <i>Q. B.</i> 410	- 540
— v. Bolton	- 1 <i>Q. B.</i> 66	- 406
— v. Bourne	- 7 <i>A. & E.</i> 58	- 495
— v. Boyes	- p. 311	- 525
— v. Chadwick, in error	- 11 <i>Q. B.</i> 173	- 448
— v. Chafin	- 3 <i>Salk.</i> 66	- 451
— v. Cudham, Inhabitants of	- 1 <i>E. & E.</i> 409	- 893
— v. Dale	- <i>Dears. & P. C. C.</i> 37	- 367
— v. Davison	- 2 <i>F. & F.</i> 250	- 462
— v. Elvet, Overseers of	- { 5 <i>Jur. N. S.</i> 1350 ; 29 <i>L. J. M. C.</i> 17	- 893

TABLE OF CASES CITED.

xvii

		Page
<i>Regina v. Ely, Inhabitants of</i>	- 15 <i>Q. B.</i> 827	- 928
— <i>v. Garbett</i>	- { 2 <i>Car. & K.</i> 474; 1 <i>Den. C. C.</i> 236	- 315
— <i>v. Goddard</i>	- 2 <i>Ld. Raym.</i> 920	- 468
— <i>v. Heaton, Inhabitants of</i>	- 28 <i>L. J. M. C.</i> 181	- 742
— <i>v. Hull, Justices of</i>	- 4 <i>E. & B.</i> 29	- 174
— <i>v. Hull and Selby Railway Com- pany</i>	- } 6 <i>Q. B.</i> 70	- 23
— <i>v. Kendal</i>	- 1 <i>E. & E.</i> 492	- 65
— <i>v. Lambeth Guardians</i>	- 5 <i>Q. B.</i> 513	- 742
— <i>v. Liverpool, Inhabitants of</i>	- 29 <i>L. J. M. C.</i> 137	- 742
— <i>v. Lumsdaine</i>	- 10 <i>A. & E.</i> 157	- 722
— <i>v. Monro</i>	- <i>Centr. Crim. Court</i> , 1847	- 318
— <i>v. Newton</i>	- 3 <i>C. & Kir.</i> 85	- 462
— <i>v. Potterhanworth, Inhabitants of</i>	- } 1 <i>E. & E.</i> 262	- 895
— <i>v. Reynolds</i>	- 13 <i>L. J. M. C.</i> 65	- 214
— <i>v. Ridpath</i>	- 10 <i>Mod.</i> 152	- 853
— <i>v. Salford, Inhabitants of</i>	- 12 <i>Q. B.</i> 106	- 894
— <i>v. St. Ann, Blackfriars</i>	- 2 <i>E. & B.</i> 440	- 893
— <i>v. St. Giles in the Fields</i>	- 11 <i>Q. B.</i> 173	- 450
— <i>v. St. Leonard's, Shoreditch, In- habitants of</i>	- } 14 <i>Q. B.</i> 340	- 894
— <i>v. St. Mary, Southampton, In- habitants of</i>	- } 5 <i>Q. B.</i> 513	- 742
— <i>v. St. Michael, Southampton</i>	- 6 <i>E. & B.</i> 807	- 23
— <i>v. Southampton Commissioners</i>	- 1. 5	- 915
— <i>v. Stanton</i>	- 5 <i>Cox Cr. Cas.</i> 324	- 695
— <i>v. Sterry</i>	- 12 <i>A. & E.</i> 84	- 75
— <i>v. Stubbs</i>	- <i>Dears. C. C.</i> 555	- 316
— <i>v. Tempest</i>	- 1 <i>F. & F.</i> 381	- 493
— <i>v. Temple</i>	- 2 <i>E. & B.</i> 160	- 75
— <i>v. Walker</i>	- 2 <i>Moo. & Rob.</i> 446	- 694
— <i>v. Wallingford Union</i>	- 10 <i>A. & E.</i> 259	- 174
— <i>v. Warwickshire, Justices of</i>	- 28 <i>L. J. M. C.</i> 249	- 66
— <i>v. Watson</i>	- 2 <i>Ld. Raym.</i> 856	- 477
— <i>v. Wenborn</i>	- 6 <i>Jur.</i> 267	- 493
— <i>v. West Middlesex Waterworks Company</i>	- } 28 <i>L. J. M. C.</i> 135	- 93
— <i>v. West Riding, Justices of</i>	- 26 <i>L. J. M. C.</i> 41	- 741
— <i>v. West Ward Union</i>	- 7 <i>E. & B.</i> 21	- 894
— <i>v. White</i>	- 4 <i>Q. B.</i> 101	- 754
— <i>v. Wilson</i>	- 12 <i>A. & E.</i> 94	- 76
— <i>v. Worth, Inhabitants of</i>	- 4 <i>Q. B.</i> 132	- 764
— <i>v. York and North Midland Rail- way Company</i>	- } 1 <i>E. & B.</i> 178	- 929
<i>Rennington v.</i> —	- <i>E.</i> 16 <i>Jac.</i> 1	- 455
— <i>v. Cole</i>	- { <i>Noy.</i> 29; <i>Bull. Co. Litt.</i> 235 a, note 1	- 455
<i>Rex v. Agar</i>	- 14 <i>East</i> , 256	- 76
— <i>v. Allen</i>	- <i>Russ. & Ry. C. C.</i> 513	- 214
— <i>v. Anne Hawkins</i>	- <i>Foster</i> , 38	- 487
— <i>v. Beverley Commissioners</i>	- 6 <i>A. & E.</i> 645	- 174
— <i>v. Birmingham Canal Navigation</i>	- 2 <i>W. Bl.</i> 708	- 929
— <i>v. Brooke</i>	- 2 <i>T. R.</i> 190	- 36
— <i>v. Cowle</i>	- 2 <i>Burr.</i> 834	- 404

		Page
Rex v. Cobbett	- Cited in 13 Q. B. 723	- 481
— v. Derbyshire, Justices of	- 6 A. & E. 885	- 540
— v. Edwards	- { 4 Tauxt. 301; 3 Camp. 207; Russ. & Ry. 224	- 481
— v. Evelyn	- { 2 Guide Pr. of Cr. Side of K. B. 550	- 852
— v. Fowler	- 4 B. & A. 273	- 514
— v. Hardy	- 24 How. St. Tr. 199. 414	- 492
— v. Hargrave	- 5 C. & P. 170	- 318
— v. Hawkins	- Fost. 38	- 487
— v. Heddingham Sible	- Burr. Sett. Ca. 112	- 67
— v. Hodnett	- 1 T. R. 96	- 451
— v. Horne Tooke	- 25 How. St. Tr. 128	- 492
— v. Jane D—	- 1 Ventr. 69	- 481
— v. Jelf alias Jeffs	- Fost. 24; 2 Str. 984	- 488
— v. Kells	- 7 Irish Law Rep. 161	- 490
— v. Keite alias Keate alias Keat	- { 1 Ld. Raym. 138; Comb. 406; 3 Salk. 191; 1 Com. 13; 5 Mod. 282; 12 Mod. 118; Skinn. 666; Cas. temp. Holt, 481	- 529
— v. Kent, Inhabitants of	- 13 East, 220	- 926
— v. Kerrison	- 3 M. & S. 526	- 926
— v. Kimbolton	- 6 A. & E. 603	- 64
— v. Ledgingham	- 1 Ventr. 97	- 492
— v. Lindsey, Parts of	- 14 East, 317	- 926
— v. Llandilo	- 2 T. R. 252	- 929
— v. Lords of the Treasury	- 4 A. & E. 286	- 82
— v. Moreley	- 2 Burr. 1040	- 404
— v. Morgan	- *Fost. 24	- 488
— v. Much Cowarne, Inhabitants of	- 2 B. & Ad. 861	- 893
— v. Perkins	- Carthew, 465; Fost. 24	- 482
— v. Reading	- 7 How. St. Tr. 259. 296	- 317
— v. —	- Cn. temp. Hard. 79	- 66
— v. Sainsbury	- 4 T. R. 451	- 365
— v. Scalbert	- 2 Leach, C. C. 620	- 481
— v. Severn and Wye Railway Com- pany	- { 2 B. & A. 646	- 926
— v. Shaftesbury, Earl of	- 8 How. St. Tr. 817	- 318
— v. Stafford, Marquis of	- 3 T. R. 651	- 23
— v. Stevenson	- 2 Leach, C. C. 546	- 481
— v. Stokes	- 6 C. & P. 151	- 461
— v. Stone	- 6 T. R. 527	- 493
— v. Taverner	- 3 Bulstr. 171	- 485
— v. Wade	- 1 Moo. C. C. 86	- 478
— v. Waldo	- Cald. 358	- 75
— v. White	- 4 Q. B. 101	- 754
— v. White	- 1 Leach, C. C. 450, n. (a).	- 490
— v. Wilkes	- { 19 How. St. Tr. 1127; 4 Burr. 2527	- 492
— v. Wilts Justices of	- 13 East, 352	- 64
— v. Woolf	- 1 Chit. Rep. 401	- 493
Richards v. Easto	- 15 M. & W. 244	- 957
Ricketts v. Bodenham	- 4 A. & E. 433	- 663
Ridgway v. Wharton	- 6 H. L. Ca. 238	- 274
Ringer v. Cann	- 3 M. & W. 348	- 180

TABLE OF CASES CITED.

xix

		Page
Ritchie v. Atkinson	- 10 <i>East</i> , 295	- 883
Roberts v. Allatt	- <i>M. & M.</i> 193, n. (b)	- 318
Roberts's Case	- <i>J. Kelyn.</i> 25	- 483
—— v. Haines	- 6 <i>E. & B.</i> 643; 7 <i>E. & B.</i> 625	- 950
—— v. Smith	- 2 <i>H. & N.</i> 213	- 440. 803
Robinson v. Harman	- 1 <i>Exch.</i> 860	- 590
Roe d. Brune v. Rawlings	- 7 <i>East</i> , 279	- 765
Rookwood's Case	- 13 <i>How. St. Tr.</i> 139	- 487
Rosetto v. Gurney	- 11 <i>C. B.</i> 176	- 48
Royal British Bank Case	- { <i>Lond. Sitt. after H. T.</i> , 1857, <i>Report by Cook Evans</i>	- 468
Rowbotham v. Wilson	- { 6 <i>E. & B.</i> 593; 8 <i>E. & B.</i> 123; 8 <i>H. L. C.</i> 348	- 949
Russell v. Thornton	- 4 <i>H. & N.</i> 788; 6 <i>Id.</i> 140	- 428

S.

Sacheverell's Case	- 15 <i>How. St. Tr.</i> 1	- 324
Sadler v. Henlocke	- 4 <i>E. & B.</i> 570	- 803
St. Giles in the Fields, appts., Strand	- 7 <i>Jur. N. S.</i> 161; 30 <i>L. J. M. C.</i>	
Union, respts.	- 12	- 893
Salisbury, Marquis of, v. Great Northern	- 5 <i>C. B. N. S.</i> 174	- 814
Railway Company	- 6 <i>H. & N.</i> 123; 8 <i>Jur. N. S.</i> 625	- 953
—— v. Gladstone	- 4 <i>Exch.</i> 390	- 306
Saunders v. Topp	- 9 <i>Mod.</i> 35	- 838
Savage v. Foster	- 1 <i>Rose</i> , 462	- 379
Scotland, Royal Bank of, v. Cuthbert	- 8 <i>Exch.</i> 487; 5 <i>H. L. C.</i> 811	- 791
Scott v. Avery	- 4 <i>John's Ch. Rep. (U. S.)</i> 218	- 49
Searle v. Scovell	- 8 <i>C. B. N. S.</i> 45; 29 <i>L. J. C. P.</i>	- 885
Seeger v. Duthie	- 253	- 885
Sheffield and Manchester Railway Com-	- 7 <i>M. & W.</i> 574	- 635
pany v. Woodcock	- 2 <i>Wils.</i> 50	- 231
Shipman v. Stevens	- 9 <i>A. & E.</i> 336	- 45
Shipton v. Thornton	- 3 <i>B. & C.</i> 12	- 378
Sidaway v. Hay	- 3 <i>Jur. N. S.</i> 631	- 329
Sidebottom v. Adkins	- 18 <i>C. B.</i> 805	- 146
Simons v. Great Western Railway Com-	- 4 <i>B. & C.</i> 281	- 428
pany	- 5 <i>E. & B.</i> 30	- 949
Skyring v. Greenwood	- 1 <i>East</i> , 6	- 378
Smart v. Morton	- 4 <i>Taunt.</i> 126	- 346
Smith v. Buchanan	- 1 <i>Taunt.</i> 359	- 429
—— v. Scott	- 2 <i>Lutw.</i> 1075	- 449
Snowdon v. Davis	- p. 652; 3 <i>L. J. N. S.</i> 294	- 665
Snowling v. Nursey	- 11 <i>C. B.</i> 481	- 564
Sommerville v. Mirehouse	- 1 <i>M. & G.</i> 448; 1 <i>Scott N. R.</i> 219	- 623
Southall v. Rigg	- 2 <i>Cr. & M.</i> 368	- 565
Southampton Dock Company v. Richards	- 10 <i>Q. B.</i> 517	- 779
Sowerby v. Butcher	- 1 <i>Ventr.</i> 6	- 396
Spence v. Chodwick	- 14 <i>East</i> , 332	- 767
Sprat v. Agar	- 5 <i>Scott, N. R.</i> 927	- 350
Stanley v. White	- 12 <i>M. & W.</i> 535	- 387
Stewart v. Steele	- 3 <i>How. St. Tr.</i> 1382	- 324
Stracey v. Nelson		
Strafford's, Earl of, Case		

TABLE OF CASES CITED.

		Page
Stratton v. Pettit	- 16 <i>C. B.</i> 420	- 373
Street v. Blay	- 2 <i>B. & Ad.</i> 456	- 246
Stretton and Taylor's Case	- 1 <i>Leon.</i> 119	- 854
Strode v. Winchester	- 1 <i>Dick.</i> 397	- 767
Sussex Peerage Case	- 11 <i>Cl. & F.</i> 85	- 767
Swan and Jefferys' Case	- <i>Fost.</i> 104; 16 <i>How. St. Tr.</i> 1194	489
Sweating v. Pearce	- 7 <i>C. B. N. S.</i> 449	- 430
Symons v. May	- 6 <i>Exch.</i> 707	- 285

T.

Tamvaco v. Lucas	- 1 <i>E. & E.</i> 581	- 193
Tarrabochia v. Hickie	- 1 <i>H. & N.</i> 183	- 883
Tarrant v. Webb	- 18 <i>C. B.</i> 797	- 442
Taylor v. Roberts	- 1 <i>H. & N.</i> 96	- 645
—— v. Young	- 3 <i>B. & A.</i> 521	- 182
Theobald v. Crichmore	- 1 <i>B. & A.</i> 227	- 669
Thistleton v. Frewer	- 31 <i>L. J. Exch.</i> 230	- 762
Thomas v. ———	- <i>Sty.</i> 461	- 397
Thompson v. Gillespy	- 5 <i>E. & B.</i> 209	- 884
—— In re (in <i>Exch.</i>)	- 9 <i>W. R.</i> 203	- 693
—— (in <i>Q. B.</i>)	- 6 <i>Jur. N. S.</i> 1247	- 694
—— v. Royal Exchange Assurance Company	- 16 <i>East</i> , 214	- 47
Thompson's Trust, In re	- 5 <i>De Gex & Sm.</i> 667	- 554
Thornhill v. Hall	- 2 <i>Cl. & Fm.</i> 22	- 554
Tinkler v. Wandsworth District Board of Works	- 27 <i>L. J. Ch.</i> 342; 2 <i>De Gex & J.</i> 261	- 870
Tooney v. London, Brighton and South Coast Railway Company	- 3 <i>C. B. N. S.</i> 146	- 443
Towers v. Osborne	- 1 <i>Str.</i> 506	- 274
Tozer v. Child	- 7 <i>E. & B.</i> 377	- 667
Trafford v. The King	- 8 <i>Bing.</i> 204; 2 <i>Cr. & J.</i> 265	- 495
Turner v. Richardson	- 7 <i>East</i> , 335	- 181
Tyson v. Smith, in error	- 9 <i>A. & E.</i> 406. 421	- 949

U.

Unity Joint Stock Mutual Banking Association, Ex parte	- 3 <i>De G. & Jones</i> , 63	- 838
--	-----------------------------------	-------

V.

Vandercomb's Case	- 2 <i>Leach C. C.</i> 708	- 467
Vardy, Ex parte	- 3 <i>Mont. D. & De G.</i> 340	- 182
Vaughan v. Imray	- 1 <i>E. & E.</i> 633	- 58
Veal v. Veal	- 27 <i>Beav.</i> 303	- 111
Vorley v. Barratt	- 1 <i>C. B. N. S.</i> 225	- 840

TABLE OF CASES CITED.

xxi

Page

W.

Walker v. Broadstock	-	1 <i>Esp.</i> 458	-	764
— v. Moore	-	10 <i>B. & C.</i> 416	-	590
Ward v. Turner	-	2 <i>Ves.</i> 431	-	111
Warlow v. Harrison	-	1 <i>E. & E.</i> 309	-	267
Watts v. Creswell	-	{ 2 <i>Eq. Cas. Abr.</i> 515, 516, pl. 3; 9 <i>Vin. Abr.</i> 415, pl. 24	-	838
Weatherhead v. Drewry	-	11 <i>East</i> , 168	-	368
Weyland v. Elkins	-	<i>Holt, N. P. C.</i> 227	-	803
Wheelton v. Hardisty	-	8 <i>E. & B.</i> 232	-	443
White v. Great Western Railway Com- pany	-	{ 2 <i>C. B. N. S.</i> 7	-	158
Whitebread and Fenwick's Case	-	7 <i>How. St. Tr.</i> 79, 311, 497	-	469
Wigget v. Fox	-	11 <i>Exch.</i> 832	-	442
Wigmore v. Jay	-	5 <i>Exch.</i> 354	-	411
Wilkinson v. Sharland	-	11 <i>Exch.</i> 33	-	232
Williams, app., Churchwardens of Llan- genwein, respts.	-	{ p. 699	-	720
— v. Burrell	-	1 <i>C. B.</i> 402	-	226
— Ex parte	-	3 <i>Jur. N. S.</i> 160	-	327
Wilson v. Willes	-	7 <i>East</i> , 121	-	949
Wing v. Taylor	-	7 <i>Jur. N. S.</i> 737	-	449
Withpole's Case	-	<i>Cro. Car.</i> 147	-	489
Wolverhampton New Waterworks Com- pany v. Hawksford	-	{ 7 <i>C. B. N. S.</i> 795	-	623
Wood v. Fenwick	-	10 <i>M. & W.</i> 195	-	215
— v. Rowcliffe	-	6 <i>Hare</i> , 183	-	835
— v. Silletto	-	1 <i>Chitt.</i> 473	-	860
Woods v. Woods	-	2 <i>Curt.</i> 516	-	450
Worsley v. Wood (in error)	-	6 <i>T. R.</i> 710	-	792
Worthington v. Gimson	-	{ 29 <i>L. J. Q. B.</i> 116; 6 <i>Jur. N. S.</i> 1063	-	579
Worthy v. Burton	-	3 <i>Keb.</i> 620	-	456
Wortley v. Watkinson	-	{ 2 <i>Lev.</i> 254; 3 <i>Keb.</i> 660; <i>T.</i> <i>Jones</i> , 118; 2 <i>Show.</i> 70	-	449, 456
Wright v. Leonard	-	11 <i>C. B. N. S.</i> 258	-	842
Wyld v. Pickford	-	8 <i>M. & W.</i> 443	-	144

Y.

Yearbook	-	41 <i>Assis. pl.</i> 11	-	499
—	-	<i>H. 7 Ed.</i> 3, 4 <i>A. pl.</i> 7	-	293 n.
—	-	41 <i>Ed.</i> 3, 31 <i>A.</i>	-	499 n.
Yelland's Case	-	{ 5 <i>De G. & S.</i> 395; 21 <i>L. J. Ch.</i> 852	-	622
York and North Midland Railway Com- pany v. The Queen	-	{ 1 <i>E. & B.</i> 858	-	926

CORRIGENDA.

- Page 41, in the first head note, *for* "warranty," *read* "stipulation."
76, line 6 from bottom, *for* (f) *after* *Regina v. Wilson*, *read* (c), and *dele* note (f).
83, at the end of the page, *insert* "Rule refused."
111, line 4 from bottom, *after* "and" *insert* "are of opinion."
234, *dele* the names of the Judges.
251, line 10, *for* "marginal note," *read* "head note."
265, *for* "marginal note, *read* "head note."
304, in note (c), *dele* 1.
374, line 6 from bottom, *for* "settlement," *read* "agreement."
387, line 8, *after* "promise" *insert*]
473, line 4 from bottom, *dele* the comma after "Queen," and the "of" before "justices," and *insert* a comma after "bench."
Id., line 3 from bottom, *dele* the comma after "Queen."
474, line 11 from bottom, *insert* "on" *before* "behalf."
635, line 12, *for* (read [
647, in the head note, *for* "amount to 254," *read* "make up the required amount."
683, line 23, *insert* a comma after "Westgate."
712, line 4, *for* "leids" *read* "leies"
836, After the last marginal point, *insert* "Departure."

CASES

1861.

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

EASTER TERM,

XXIV, VICTORIA.

The Judges who usually sat in Banc in this
Term were:

COCKBURN C. J.		HILL J.
CROMPTON J.		BLACKBURN J.

HARTLEY *against* SHEMWELL.

MARPLES *against* HARTLEY.

Tuesday,
April 16th.

Common Law
Procedure Act,
1854, s. 61.
Garnishee.
Extinguish-
ment of debt.

H. recovered judgment in an action against *S.*, and issued a writ of *fi. fa.*, under which *S.*'s goods were seized. On an interpleader issue between *H.* and *M.*, who claimed the goods of *S.* which were so seized, *M.* had a verdict, and obtained an order for his costs, which were taxed. *H.* issued a writ of *ca. sa.* against *S.*, who was arrested. *M.* obtained a Judge's order, under sect. 61 of The Common Law Procedure Act, 1854, 17 & 18 *Vict.* c. 125., to attach the debt due from *S.* to *H.*; and the amount was allowed in account between *M.* and *H.* *S.* having obtained an order to be discharged out of custody in the action of *H. v. S.*: Held, that *M.* was a judgment creditor of *H.* within the meaning of sect. 61.: and that the arrest of *S.*, the garnishee, did not extinguish his debt to *H.*, or bar *M.*'s right to attach it under that section.

IN the first of these two actions, which was for goods sold and delivered, the plaintiff *Hartley*, on 30th

1861.

HARTLEY
v.
SHEMWELL.
MARPLES
v.
HARTLEY.

June, 1860, signed judgment by default for 27*l.* 5*s.* A writ of fi. fa. was issued on that judgment; and, on 3d *July*, 1860, certain goods of the defendant *Shemwell* were seized in execution. At the time of the seizure the sheriff received notice from one *William Marples* of a claim to the goods. An interpleader summons was obtained on behalf of the sheriff; and *Wightman J.*, on the hearing, directed an interpleader issue, *Marples v. Hartley*. This issue was tried, and a verdict found for the plaintiff. On 14th *February*, 1861, the plaintiff *Marples* obtained an order for the costs of the trial of this issue, which were taxed and amounted to 67*l.* 1*s.* 6*d.* On 28th *February*, 1861, the plaintiff *Hartley* issued a writ of ca. sa. against *Shemwell*, who, on 2d *March*, 1861, was arrested. On 15th *March*, 1861, *Marples* obtained an order of *Bramwell B.*, under The Common Law Procedure Act, 1854, (17 & 18 *Vict. c.* 125.), *s.* 61., to attach the debt of 27*l.* 5*s.* (which, with costs, amounted to 30*l.* 5*s.*) due from *Shemwell* to *Hartley*. On 16th *March*, 1861, *Bramwell B.* made an order, under the same section, directing that *Shemwell*, the garnishee, should pay to *Marples*, the claimant, the sum of 30*l.* 5*s.* due from the garnishee to *Hartley*, the plaintiff in *Hartley v. Shemwell*, in part payment of the 67*l.* 1*s.* 6*d.*, the costs of the interpleader issue, due from *Hartley* to *Marples*. On 19th *March*, 1861, *Shemwell* obtained a summons calling upon *Hartley* and *Marples* to shew cause why *Shemwell* should not be discharged out of custody, as to the action of *Hartley v. Shemwell*, the sum of 30*l.* 5*s.* (being the amount of debt and costs in that action) having been paid by the defendant, as a garnishee, to *Marples*, under the above orders. On the hearing of this summons, *Bramwell B.*, on 20th *March*, 1861, made

an order that, on payment of the sum of 1*l*. 6*s*., the plaintiff's costs of execution in the action of *Hartley v. Shemwell*, to the plaintiff in that action, or to the sheriff on his behalf, the defendant *Shemwell* be discharged out of custody as to that action. *Shemwell* was accordingly discharged out of custody. The sum of 30*l*. 5*s*. was not actually paid : but *Marples* had given credit to *Hartley* for that sum against the 67*l*. 1*s*. 6*d*., the costs of the interpleader issue.

1861.

HARTLEY
v.
SHEMWELL.
MARPLES
v.
HARTLEY.

Field now moved for a rule calling upon *Marples* and *Shemwell* to shew cause why the three orders of *Bramwell B.*, dated respectively 15th, 16th and 20th March, 1861, should not be rescinded, all proceedings thereunder set aside, and *Hartley* be at liberty to issue a new writ of ca. sa., and arrest *Shemwell* for the amount of the judgment debt. The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. s. 61., provides that "it shall be lawful for a Judge, upon the ex parte application of such judgment creditor either before or after" "oral examination, and upon affidavit by himself or his attorney, stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, to order that all debts owing or accruing from such third person to the judgment debtor shall be attached to answer the judgment debt." In order, therefore, to entitle *Marples* to an order for an attachment under this section, it is necessary for him to establish, first, that he is a judgment creditor of *Hartley*, and, secondly, that there is another person indebted to *Hartley*. Now *Marples* is not a judgment creditor of *Hartley* within

1861.
 HARTLEY
 v.
 SHERWELL.
 MARPLES
 v.
 HARTLEY.

the meaning of sect. 61; nor is any other person indebted to *Hartley*. By the arrest of *Sherwell* under the writ of ca. sa. *Hartley* lost his right to issue a writ of fi. fa. The proceedings under the Act with respect to an attachment of debts are in the nature of a statutory execution. By sect. 63, if the garnishee does not pay into Court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, or if he does not dispute the debt, or does not appear to the summons issued against him, the Judge may order execution to issue against him to levy the amount due. No execution can issue against the goods of the garnishee while he is in custody under a writ of ca. sa. [*Hill J.* As long as a judgment creditor holds the body of his debtor he cannot take another step; but the debt is not extinguished.] In *Jauralde v. Parker* (a), where a judgment creditor proceeded against a garnishee, the defendant pleaded that the plaintiff had sued out a writ of ca. sa., and, before the issuing of the writ of attachment, had caused the defendant to be taken in execution: and, on demurrer, the Court held the plea good. [*Blackburn J.* There the judgment creditor had arrested the judgment debtor; here the judgment debtor had the garnishee in custody. *Crompton J.* I think the order for payment of the costs of the interpleader issue has the effect of a judgment; and that the arrest of the garnishee is not an extinguishment of his debt to *Hartley*.]

PER CURIAM. (COCKBURN C. J., CROMPTON, HILL and BLACKBURN Js.)

Rule refused.

(a) 6 H. & N. 431.

1861.

The QUEEN, on the prosecution of the Mayor,
Aldermen and Burgesses of SOUTHAMPTON,
against The Commissioners of the Port of
SOUTHAMPTON.

Saturday,
April 20th.

Mandamus.
"Legal measures."
Pleading.

1. Quere whether, under any circumstances, a mandamus lies to compel a party to institute legal proceedings against another?

2. A duty having been imposed upon a party by statute to levy certain moneys from other parties, and pay over to another a portion of the sums levied; a mandamus was issued directing him "to take the necessary and legal measures and proceedings, for obtaining and recovering payment": Held, per *Crompton* and *Blackburn* Js. (*Cockburn* C. J. dissentiente), that the words "legal measures" did not necessarily mean the instituting legal proceedings.

3. Semble that a mandamus may be issued against a party for a matter in respect of which he is liable to an action or to a suit in equity.

4. The mandatory part of a writ of mandamus may be very general; but the return must be very minute in shewing why the party did not do what he was commanded: per *Crompton* and *Blackburn* Js.

MANDAMUS to the Commissioners appointed in pursuance and acting in execution of stat. 43 G. 3. c. xi, intituled "An Act for abolishing certain dues called Petty Customs, Anchorage and Groundage, and for improving the port of the town of *Southampton*; for making a convenient dock for the security of ships; for extending the quays and wharfs, and making docks and piers in the harbour there; and for erecting warehouses for the safe custody of goods and merchandize, and for imposing certain duties for the above purposes;" and stat. 50 G. 3. c. clxviii., for altering and amending the previous Act. The writ recited that, by the first mentioned Act; after reciting, among other things, that the Mayor, bailiffs and burgesses of the town and county of the town of *Southampton* had, by virtue of several charters granted to them by His Majesty's progenitors,

1861.
The QUEEN
v.
Commissioners
of Port of
SOUTHAMP-
TON.

Kings and Queens of *England*, received and been entitled, or claimed to be entitled, to receive certain duties called petty customs upon the exportation and importation of all goods and merchandize out of and into the port of *Southampton* from the owner, exporter or importer of such goods and merchandize, and also certain other duties called anchorage and groundage payable by all vessels coming within and not belonging to that port, together with wharfage and cranage, from the owners and masters of all such vessels; and that the said rights, privileges, immunities, exemptions and advantages the said Mayor, bailiffs and burgesses were willing to relinquish and give up, upon a compensation being made for the loss and diminution that would accrue to them by abolishing the same: it was, among other things, by the 13th section thereof enacted that, from and after the second *Monday* after the passing of that Act, the duties called petty customs, wharfage, cranage and anchorage and groundage should cease and be no longer paid, and that there should from thenceforth be paid unto the Commissioners for putting that Act into execution, as well by the persons being respectively members of the corporation of the town and county of *Southampton*, and the owners and masters having the command of vessels belonging to that port, as by all and every person and persons whomsoever, for all goods, wares, merchandize and commodities exported from or imported into the port of *Southampton*, and which should be landed in or shipped from the dock or basin to be constructed under the authority of that Act, or at or from any of the legal quays in that town, and for warehousing the same, and for all ships or vessels coming into the pier, dock or basin, or the road for

ships there in that Act referred to, the several and respective rates, wharfage, keelage, boomage, pier dues, dock dues or duties mentioned and specified and enumerated in the table thereunto annexed, and no other rates, customs or duties for the same or in respect thereof under any denomination whatsoever. And by the 19th section it was enacted that all and every such sum and sums of money as should be raised and received by the duties aforesaid, or recovered for any forfeitures by that Act appointed, other than so much thereof as should be allowed to the collector or other officers for collecting and managing the said duties, or for charges of recovering the same, should be by the said Commissioners applied and disposed of as follows: in the first place, to the payment of one fifth part of the said sum or sums of money to the Mayor, bailiffs and burgesses for the time being and their successors yearly and every year after the commencement of that Act, as and for a compensation for the loss and diminution which would accrue to them by the abolishing the duties called petty customs, wharfage, cranage, anchorage and groundage; and from and after the payment thereof the residue should be applied and disposed of to the building and repairing the said pier, dock or basin, warehouses and other works, and for securing, preserving, amending and maintaining the said dock or basin and harbour of *Southampton*, and for placing, fixing and maintaining at all necessary places a sufficient number of booms for marking the channels in that Act before enumerated. And that by the 48th section it was further enacted that, when any action or suit should be brought by order of the Commissioners against any person or persons in pursuance or by virtue of that Act, the same

1861.

The QUEEN
v.
Commissioners
of Port of
SOUTHAMP-
TON.

1861.

The QUEEN
v.
Commissioners
of Port of
SOUTHAMP-
TON.

should be brought in the name of their clerk or treasurer on behalf of the Commissioners, and that no such action or suit should abate or be discontinued by the death or removal of such clerk or treasurer, or by the act of such clerk or treasurer, without the consent of the Commissioners for the time being. And that by the Act second above mentioned it was amongst other things provided, by the 1st section thereof, that the first mentioned Act, and all and every the clauses, powers, penalties, forfeitures, rates, remedies, payments, provisions, articles, matters and things whatsoever therein contained, save and except such parts as were thereby varied, altered or repealed, should be as good, valid and effectual for carrying the first mentioned Act into execution as if the same had been repeated in the body thereof. And that by the 13th section of the second Act it was further provided that, from and after the *Monday* next after the passing of that Act, the several rates or other dues or payments which might be demanded, taken, collected or received under or by virtue of the first mentioned Act should cease and determine, and should not be demanded, taken, collected or received. And by the 14th section that, from and after that *Monday*, there should be paid unto the Commissioners, as well by the persons being respectively of the Corporation of the town and county of *Southampton*, and the owners and masters having the command of ships or vessels or small craft belonging to the port of *Southampton*, as by all and every other persons or person whomsoever, for all goods, wares, merchandize and commodities whatsoever exported from or imported into the port of *Southampton*, and which should be loaded in or shipped from the dock or docks, wharf or wharfs, basin

or basins, to be constructed under the Acts or either of them, or at any other legal quays in the town of *Southampton*, and for warehousing the same, and for all ships and vessels coming into the pier or piers, dock or docks, basin or basins to be constructed as aforesaid, or the road for ships there, the several rates and duties mentioned, specified, enumerated and imposed in and by the table thereunto annexed.

The writ further recited that by stat. 6 & 7 *W.* 4. c. xxix., intituled "An Act for making and maintaining a dock or docks at *Southampton*," certain persons were incorporated by the name and style of *The Southampton Dock Company*; and it was by the 5th section of that Act enacted that it should be lawful for that Company, and they were thereby authorized and empowered to design, lay out, excavate, build, erect, make, complete, repair and maintain, in, over, under, through and upon certain lands, tenements and hereditaments therein mentioned, navigable docks, together with quays, wharfs and other matters and things necessary or proper for carrying into effect the purposes of that Act; and, by the 121st section, that all and every the docks which should be made under the authority of that Act should be deemed and held to be situate within and part of the port of the town of *Southampton*, and that the rights and privileges which belong to the port of the town of *Southampton* should extend to the said docks, and all ships and vessels entering into or loading or unloading in the docks, and all owners and masters of ships, merchants and others resorting thereto, should be subject to the several regulations, and liable to the duties of tonnage and boomage and other duties, to which they were subject or liable in the port of the town of *South-*

1861.

The QUEEN
v.
Commissioners
of Port of
SOUTHAMP-
TON.

1861. *ampton*, as if the same ships and vessels had loaded or unloaded at the public quays of the Commissioners acting in execution of stats. 43 *G. 3. c. xxi.* and 50 *G. 3. c. clxviii.*; and it was by the 124th section further enacted that, for providing against any loss or diminution of income which might be sustained by those Commissioners, the Company should, and they were thereby required to, pay to the Commissioners for the time being (from and after the opening of the dock or docks for the reception of ships and goods), out of the rates, rents and sums thereby authorized to be taken and received, such annual sum as should be sufficient to make up the annual income of the said Commissioners, to be derived under and by virtue of stat. 50 *G. 3. c. clxviii.* from the rates, duties and payments thereby authorized to be taken and received in respect of goods, wares, merchandize and other commodities, to such annual amount as should be equal to the average annual income derived by the Commissioners from the last mentioned rates, duties and sums during the three years next preceding the passing of that Act; and that such annual sum should be computed up to the 25th day of *March* in each year, and be payable on the 1st day of *May* in each year; and that, in case the dock or docks should be opened on any other day than the 25th day of *March*, then a proportionable sum should be paid in respect of the time which should elapse between the opening of them and the 25th day of *March* then next following, and which should be payable on the 1st day of *May* next following; and that such annual payments and proportionable part should be paid and payable in preference to the interest of the money which should be raised by any mortgage, assignment or charge as therein

The QUEEN
v.
Commissioners
of Port of
SOUTHAMP-
TON.

provided, and in preference to any dividends payable by virtue of that Act to the proprietors of the Company or any of them : provided always that, in case the Commissioners should at any time reduce, alter or vary the last mentioned rates, duties and sums below the rates, duties and sums then received and taken by them on such goods, wares and merchandize, the Company should not be liable to pay to the Commissioners, in respect of such loss or diminution of income, any greater sum than the difference between the annual income which would have been received by the Commissioners in case such rates, duties and sums last mentioned had not been so reduced, altered or varied, and the average annual income derived by the Commissioners from the same rates, duties and sums during the three years next preceding the passing of that Act.

The writ further recited that by stat. 6 & 7 *Vict.* c. lrv., intituled "An Act to convert the shares in the capital authorized to be raised by the Acts for making a dock or docks at *Southampton* into stock ; to raise a further sum of money, and to alter and amend some of the powers of the said Acts," it was enacted, among other things, that the provisions of the 124th section of stat. 6 & 7 *W.* 4. c. xxix. should be repealed ; and by the 53rd section it was enacted that, for providing against any loss or diminution of income which might be sustained by the Commissioners acting in the execution of stats. 43 *G.* 3. c. xxi. and 50 *G.* 3. c. clxviii., in case the annual income of the Commissioners arising from the rates, duties and payments by them taken and derived in respect of goods, wares, merchandize and other commodities should, in any one year after the opening of the dock or docks for the reception of ships

1861.

The QUEEN
v.
Commissioners
of Port of
SOUTHAMP-
TON.

1861.

The QUEEN
v.
Commissioners
of Port of
SOUTHAMP-
TON.

and goods, fall below the sum of 1000*l.*, then the Company should, and they were thereby required to, pay to the Commissioners for the time being, out of the rates, rents and sums thereby or by the Acts therein in that behalf authorized to be taken and received by the dock Company or their successors, such annual sum as should be sufficient to make up any such deficiency; and that such annual sum should be computed to the 31st day of *March* in each year, and should be paid and payable to the Commissioners on the 24th day of *June* in each year; and in case the dock or docks should be opened on any other day than the 31st day of *March*, then a proportionate sum should be paid in respect of the time which should elapse between the opening of the dock or docks and the 31st day of *March* then next following, and that such annual payment and proportionable part should be paid and payable in preference to the interest, dividends and income of the moneys or stocks which should be raised or created under any of the powers or provisions of that Act, or of the Acts therein in that behalf &c., and in preference to any dividends or income payable by virtue of that Act, or by the Acts therein in that behalf recited and referred to, to the proprietors of the said undertaking, or any of them, and that such annual payments and proportionable part should be paid and payable as aforesaid, notwithstanding the Commissioners should, at any time or times, reduce, alter or vary the last mentioned rates, duties and sums below the rates, duties and sums then received and taken by them on such goods, wares and merchandize, and notwithstanding the Commissioners should, at any time or times, compound and agree, by the year or for any shorter time, with any person or

persons for or in respect of such last mentioned rates, duties and sums, and should accept and take such rent or rents or sum or sums of money, by the year or for any shorter time, in lieu of such last mentioned rates, dues and sums on such goods, wares and merchandize.

1861.

The QUEEN
v.
Commissioners
of Port of
SOUTHAMP-
TON.

The writ then proceeded thus. "And whereas we have been given to understand and be informed &c. that certain docks were afterwards, on or about the 23d day of *November*, 1842, in pursuance of the Act in that behalf, opened for the reception of ships and goods, and that, after the docks were so opened, that is to say in the year which ended the 31st day of *March*, A.D. 1847, and in each of the eleven succeeding years, the annual income of the Commissioners for the time being appointed in pursuance and acting in execution of the Acts first and secondly above mentioned, arising from the rates, duties and payments by them taken and derived in respect of goods, wares and merchandize, and other commodities, fell below the sum of 1000*l*." [here the writ set out the amounts by which that income fell below 1000*l*. on the 31st *March*, in each of the years ending respectively on the 31st *March*, 1847—1858, making in all a deficiency of 3710*l*. 7*s*.] "And whereas we have further been given to understand and be informed &c. that no part of the deficiency in respect of any one of the said twelve years has ever been paid to you or to the Commissioners for the time being acting in the execution of the said Acts firstly and secondly above mentioned, or has ever been claimed or demanded by you or by the Commissioners for the time being acting in execution of the said Acts first and secondly above mentioned from the said *Southampton Dock Company*, and that no part of the said deficiency

1861.
 The QUEEN
 v.
 Commissioners
 of Port of
 SOUTHAMP.
 TON.

in respect of any one of the said twelve years has ever been paid over by you to the said Mayor, aldermen and burgesses of *Southampton*. And whereas we have been given to understand and be informed that, under and by virtue of the law and statutes in that behalf, after receipt by you of such deficiency, one fifth part of the said deficiency, in respect of each of the said twelve years (other than and except so much thereof as ought to be allowed to the collector or other officers for charges of collecting the same, or for collecting and managing the duties recoverable by the Commissioners acting in execution of the said Acts first and secondly above mentioned), is and would be payable by you to the said Mayor, aldermen and burgesses of *Southampton*, and that the said deficiency of 3710*l.* 7*s.* ought to be recovered by you from the said *Southampton Dock Company*, and one fifth part thereof, other than and except as aforesaid, paid over by you to the said Mayor, aldermen and burgesses of *Southampton*. And whereas you were afterwards, on or about the 10th day of *August*, 1859, duly required, by and on behalf of the said Mayor, aldermen and burgesses of *Southampton*, to take the necessary and legal measures for recovering payment to you of the said deficiency of 3710*l.* 7*s.* from the said *Southampton Dock Company*, and to pay over one fifth part thereof, other than and except as aforesaid, to the said Mayor, aldermen and burgesses of *Southampton*, but you have wholly neglected and refused, and still neglect and refuse so to do, in contempt of us and to the great hurt and prejudice of the said Mayor, aldermen and burgesses of *Southampton*, as we have been informed from their complaint made to us : whereupon the said Mayor, aldermen and burgesses have humbly besought us that a fit and

speedy remedy may be applied in this respect, and we, being willing that due and speedy justice should be done in the premises as it is reasonable, do command you, the said Commissioners appointed in pursuance and acting in execution of the said Acts first and secondly above mentioned, firmly enjoining you that forthwith, after the receipt of this our writ, you take the necessary and legal measures and proceedings for obtaining and recovering payment to you, by and from the said *Southampton Dock Company*, of the said several sums of money so making as aforesaid the said deficiency of 371*l.* 7*s.*, and that you pay over one fifth part thereof (other than and except as aforesaid) to the said Mayor, aldermen and burgesses of *Southampton*, or that you shew us cause to the contrary thereof," &c.

To this writ the Commissioners made a return, stating that, by the 18th sect. of stat. 43 *G. 3. c. xxi.*, it was enacted that the Commissioners should have full power and authority, and were thereby authorized and empowered to make such orders and rules, and give such directions, for the collecting, receiving and disposing of the sums of money and duties therein mentioned as they should think most necessary and conducive to the end for which the same were thereby given; and that after the passing of the several Acts of Parliament in the writ respectively mentioned, by stat. 9 & 10 *Vict. c. xxvi.*, intituled "An Act for amending certain Acts of the forty-third and fiftieth years of the reign of His late Majesty King George the Third, relating to the port and harbour of the town and county of the town of *Southampton*;" after reciting the Acts of Parliament in the writ first and secondly mentioned, and that the Commissioners for the time being acting in the execution of those Acts had at

1861.

The QUEEN
v.
Commissioners
of Port of
SOUTHAMP-
TON.

1861.

The QUEEN
v.
Commissioners
of Port of
SOUTHAMP-
TON.

divers times made certain of the improvements by those Acts respectively authorized, but had not completed the whole of such improvements; and that for the purpose of making such improvements the Commissioners from time to time borrowed and raised, in pursuance of the said Act, 43 *G. 3. c. xxi.*, divers sums of money amounting in the whole to the sum of 22,892*l. 4s. 1d.*, whereof part was raised by granting annuities, and they afterwards paid off the sum of 200*l.*, part of the moneys so borrowed, and divers of the annuities so granted had since determined, and the sum of 11,512*l. 4s. 1d.* bearing interest at 5*l.* per cent. per annum, and 800*l.* bearing interest at 4*l.* per cent. per annum, making together the sum of 12,312*l. 4s. 1d.*, was then remaining unpaid, and one moiety of 200*l.* was then remaining payable; and that by reason of the great increase of the traffic at the port of *Southampton* it was desirable that the Commissioners should proceed from time to time with the improvements by those Acts authorized; and that the Commissioners then had power, under stats. 43 *G. 3. c. xxi.* and 50 *G. 3. c. clxviii.*, to borrow the sum of 7107*l. 15s. 11d.* only, and they had no power under those Acts to pay off and reborrow any part of the money once raised by them, and they were consequently unable to make sufficient arrangements for reducing the interest then payable from five per cent. to a lower rate; and that it was desirable that the Commissioners should have power to borrow further sums for the purposes of those Acts, and should have power to pay off and reborrow the money raised by them, and that the provisions of those Acts should be amended, but such purposes could not be effected without the authority of Parliament; it was by the first section enacted that stat. 43 *G. 3. c. xxi.*, except

so far as the same or any part thereof was repealed or altered by stat. 50 *G. 3. c. clxviii.* or that Act, and stat. 50 *G. 3. c. clxviii.*, except so far as the same or any part thereof was repealed or altered by that Act, and that Act should respectively be carried into execution as one Act by such Commissioners as were by stat. 50 *G. 3. c. clxviii.* appointed Commissioners for putting the same Act and stat. 43 *G. 3. c. xxi.* into execution ; and by the second section of the same Act it was further enacted that the sum or sums of money which, inclusive of the said sum of 12,312*l. 4s. 1d.* then due as aforesaid, such Commissioners might borrow and take up at interest in pursuance of stat. 43 *G. 3. c. xxi.*, should be any sum or sums of money not exceeding 60,000*l.* And by the 3*d* section of the same Act it was further enacted that the rates granted by stat. 50 *G. 3. c. clxviii.* should be the rates on the credit whereof such Commissioners should borrow such moneys. And by the 4*th* section of the same Act it was further enacted that such Commissioners might from time to time apply any moneys for the time being in their hands, and not required for any other purposes expressed in the said recited Acts &c., or towards repayment of any moneys theretofore borrowed and remaining unpaid, and might from time to time again borrow and take up any further sum or sums of money, but so that the total sum at one and the same time borrowed and taken up should not exceed 60,000*l.* And it was by the 6*th* section of the same Act further enacted that the provisions respecting raising money by granting annuities in stat. 43 *G. 3. c. xxi.* should be and were thereby wholly repealed ; and by the 7*th* section of the same Act it was further provided and enacted that the several rates or duties authorized to be taken by

1861.

The QUEEN
v.
Commissioners
of Port of
SOUTHAMP-
TON.

1861.
 The QUEEN
 v.
 Commissioners
 of Port of
 SOUTHAMP-
 TON.

that Act or the said recited Acts or either of them should at all times be charged equally and after the same rate and in respect of the same description of vessels and goods. And it was also enacted by the 4th section of stat. 6 & 7 W. 4. c. xxix., that all the money to be raised or received by *The Southampton Dock Company* by virtue of that Act, whether by way of capital or profits or otherwise, should be laid out and applied in the first place in paying and discharging all costs and expences incurred in applying for, obtaining and passing that Act, and all other expences preparatory or relating thereto, and the remainder of such money should be applied in and towards purchasing lands and making and maintaining the dock or docks and other works, and otherwise in carrying that Act into execution.

The return then stated that in the year which ended the 31st of *March*, 1847, and in each of the eleven succeeding years mentioned in the writ, the annual income of the Commissioners for the time being in the writ mentioned arising from the rates, duties and payments by them taken and derived in respect of goods, wares, and merchandize and other commodities, and also in respect of tonnage duty and boomage duty, exceeded the sum of 1000*l.* in each of those years [Here were set out the amounts by which that income in each of those years exceeded that sum] : which excess in those twelve years in all amounted to the sum of 21,183*l.* 1*s.* 8*d.* That the accounts of the receipts, and of the annual income as aforesaid, had from time to time been considered by the Commissioners ; and that at a meeting of those Commissioners, holden on *Monday* the 20th day of *December*, 1858, at which eighteen of those Commissioners were present, it was resolved, by

1861.

The QUEEN
V.
Commissioners
of Port of
SOUTHAMP-
TON.

fourteen of the Commissioners against three, to the effect (one of the said Commissioners present not voting) that, as the gross income in the receipts of those Commissioners since the opening of the docks had been 5794*l.* 8*s.* 7*d.*, there was no ground whatever for an application to *The Southampton Dock Company*. That during the said period of twelve years and until the 29th day of *September*, 1859, the account of the several rates, duties, and payments so taken and derived by the Commissioners during the term last aforesaid, in respect of goods, wares, and merchandize and other commodities, and also in respect of tonnage duty and boomage duty mentioned or referred to in the statute in such case made and provided, had been fairly drawn up and stated according to the provisions of the statute in that behalf, ending the 29th *September* and the 25th *March* in every year of those years, and the banker who during the time aforesaid was appointed to act, and acted, as the treasurer of the Commissioners for the time being, had duly paid or caused to be paid unto the Mayor and common council in the statute in that behalf mentioned, that is to say, the Mayor, aldermen, and burgesses of the said town or borough of *Southampton*, one fifth part of the rates, duties and payments so taken and derived during the said period of twelve years by the Commissioners until the 29th *September*, 1859, in respect of goods, wares, and merchandize, and other commodities, and also in respect of tonnage duty and boomage duty, other than so much thereof as was allowed to the collector or other officer for collecting and managing, or for charges of recovering the same in manner in the statute in that behalf mentioned, in all things according to the terms of that statute; and the Mayor, aldermen and burgesses aforesaid then

1861.

The QUEEN
v.
Commissioners
of Port of
SOUTHAMP-
TON.

duly accepted such payment as and for the compensation mentioned in the 19th section of the Act in the writ first mentioned, and did not at any time until after the 25th *March*, 1859, that is to say, until on or about the 16th day of *August*, 1859, in the writ mentioned, claim any other sum of money as being due to them under either of the Acts mentioned in the writ or in this return; and at a meeting of the council of the borough, duly holden on *Wednesday* the 9th day of *March*, 1859, at which twenty-three members of the council were present, by a resolution of the council duly made at that meeting by fifteen of the members of the said council against five (three of the members of the said council present not voting), the Mayor, aldermen, and burgesses of the council resolved that, as the Commissioners had decided by a majority of fourteen to three that there was no ground for application to *The Southampton Dock Company* for money said to be due by them to the Commissioners, and that as their proceedings had been approved of, in one case unanimously and in the other by a very large majority, at ward meetings of the burgesses of *All Saints* and *Saint Mary*, comprising five sixths of the ratepayers of the town, there was no necessity for entertaining the subject at that meeting, &c. That the Commissioners had, from time to time, applied and disposed of the residue of the sum and sums of money raised and received as aforesaid by the duties aforesaid, or recovered for any forfeitures, to the building and repairing the piers, docks, or basin warehouse and other works, and maintaining the dock or basin and harbour of *Southampton*, and for placing, fixing and maintaining at all necessary places a sufficient number of booms for marking the channels enumerated in the statute in that behalf, and for the other purposes mentioned in the Acts

first and second mentioned in the writ, and had also from time to time applied the moneys for the time being in their hands, and not required for any other purpose expressed in those Acts, in or towards the repayment of moneys borrowed and remaining unpaid pursuant to the provisions of the Act for amending stats. 43 G. 3. c. xxi. and 50 G. 3. c. clxviii. The return then proceeded thus: "And the Commissioners claim to be entitled, and have been advised and submit that they are entitled, to apply all such moneys for the time being in their hands, and not so required as aforesaid, in or towards such repayment as aforesaid at their discretion; and in the exercise of that discretion it has appeared to be and is the opinion, as well of the Mayor, aldermen and burgesses of the borough of *Southampton* aforesaid, as of the Commissioners, expressed at meetings of the said council, and of the Commissioners duly holden in that behalf, no such measures or proceedings as in the writ mentioned should be taken against *The Southampton Dock Company*. And *The Southampton Dock Company* have, after such settlements and payments as aforesaid had been made between the Commissioners and the Mayor, aldermen and burgesses, duly applied the several moneys from time to time raised and received by the Company in carrying into execution the Act for making and maintaining a dock or docks at *Southampton* and the other Acts relating thereto: wherefore we have been advised and submit that the Commissioners are not, nor are we bound by the common law of the land, or by the statutes in the writ and herein mentioned, or by any other statute, to take the necessary and legal, or any measures and proceedings for obtaining and recovering payment to them by and from the said *Southampton Dock Company* of the other several sums of money, making

1861.

The QUEEN
v.
Commissioners
of Port of
SOUTHAMP-
TON.

1861. the supposed deficiency of 3710*l.* 7*s.*, and to pay over
 The QUEEN one fifth part thereof (other than and except as in the
 v. writ aforesaid) to the Mayor, aldermen and burgesses of
 Commissioners of Port of *Southampton,*" &c.
 SOUTHAMP-
 TON.

Demurrer and joinder. Several pleas, not here material, were also pleaded to the return.

Montague Smith, for the prosecution. The statutes set forth in the writ impose a legal duty on the defendants to collect this money from *The Southampton Dock Company*, and pay one fifth of it over to the corporation of *Southampton*; and the mandamus only requires them to take the necessary and lawful steps for that purpose. Rates are often directed by mandamus to be made when money is borrowed of churchwardens, and in such like cases. Then the facts stated in the return do not constitute an answer to the writ. The defendants do not say that they have not received the money, or that payment of it will be refused, or even that they have demanded it. (He raised some other objections to the return, which it is unnecessary to mention.)

Lush, for the defendants. If the argument on the other side, that a legal duty is imposed on the defendants of collecting this money, is well founded, they would be bound, if necessary, to take legal proceedings for that purpose. A mandamus does not lie to compel a party to involve himself in litigation: the proper remedy for failure of duty in such cases is by action at law or suit in equity, which will lie against a public company; *Cane v. Chapman* (a). [*Crompton J.* We constantly grant a mandamus against railway compa-

(a) 5 A. & E. 647.

nies in cases where an action would lie against them.

Hill J. Regina v. Hull and Selby Railway Company (a) is an authority that a mandamus may be issued against a party for a matter in respect of which he is liable to an action.] But in truth no legal duty is imposed on the defendants until the money has been received by them from the Dock Company, although they may be guilty of a breach of trust for not levying it. This further appears from the fact that the defendants are directed to bring the amounts of various penalties, forfeitures, and duties into the fund which they are to raise; and it is discretionary with them whether they will levy those penalties and forfeitures and lower those duties.

1861.

The QUEEN
v.
Commissioners
of Port of
SOUTHAMP-
TON.

Montague Smith, in reply. No action could be maintained against the defendants by the prosecutors of this mandamus; and, even if it could, non constat that the damages recovered in it would be commensurate with the loss sustained. Where a statutory duty is imposed on a party, a mandamus will lie to compel him to discharge it, although there is a remedy against him in equity; per *Buller J.* in *Rex v. The Marquis of Stafford* (b); *Regina v. St. Michael, Southampton* (c).

COCKBURN C. J. I am sorry that, in the judgment I am about to pronounce, I must differ from the other members of the Court; but I am of opinion that this mandamus is bad, and that no fresh one ought to be issued. It appears to me that what this mandamus means is that the defendants are called upon, not only

(a) 6 Q. B. 70.

(b) 3 T. R. 651-2.

(c) 6 E. & B. 807.

1861.

The QUEEN
v.
Commissioners
of Port of
SOUTHAMP-
TON.

to apply to *The Southampton Dock Company* for payment of these moneys, but, if necessary, to enforce their demand by proceedings at law. This is the only construction I can put on the words which enjoin the defendants to "take the necessary and legal measures and proceedings for obtaining and recovering payment from *The Southampton Dock Company*." The word "legal" must, I think, be understood as having some signification, seeing it is superadded to "necessary;" and it is not to be supposed that the Court would introduce the word "legal" into a writ in order to point out to the parties to whom it is addressed that in executing it they are not to take measures which are contrary to law. I therefore suppose that the word "legal" here has the signification which it has in ordinary parlance, namely, as contradistinguished to "moral," and as directing some sort of litigation.

Looking, then, at the circumstances of this case as set out in the writ and return, I am of opinion that we ought not to command the defendants, at their own risk, to enter into litigation with *The Southampton Dock Company*. If, instead of adopting this proceeding by mandamus, the prosecutors had had recourse to a Court of equity, the relators would have been compelled to give the defendants an indemnity against the costs of bringing an action against the Company; and in point of justice we ought not to impose on the defendants the duty of suing *The Southampton Dock Company* except on the same equitable terms, especially when we see that, in the event of their doing so, there will be a very serious litigation behind. It may indeed be suggested that, as the language of this mandamus is general, the defendants ought to have stated in their return that they

applied unsuccessfully to the prosecutors for such an indemnity; but the answer to that is that the writ in its terms is not conditional, but absolute.

1861.

The QUEEN
v.
Commissioners
of Port of
SOUTHAMP-
TON.

CROMPTON J. I regret that questions such as are raised in this case should be disposed of on a minute and technical point of special pleading.

I agree with my Lord Chief Justice that if this writ had, in words, directed the defendants to bring an action against *The Southampton Dock Company* for this money, it could not be supported. I think also that the return is bad, for reasons into which it will be needless to enter, and that the defendants might be ordered by mandamus to perform the statutory duty cast upon them by these enactments, even though the right of the prosecutors against them were merely of an equitable nature. But the only point necessary for us to determine is, whether the mandatory part of this writ is good. Now I have always understood that, in the law of mandamus, the rule is that the mandatory part of the writ may be very general, but that the return must, on the contrary, be very minute in shewing why the party did not do what he was commanded. Then the whole question is, are we to understand the mandatory part of this writ as necessarily meaning that the defendants are, at their own risk, to take legal proceedings against *The Southampton Dock Company* to recover this money? Or may we understand it as simply meaning that they are to take such steps for that purpose as are necessary and proper under the circumstances? My Lord Chief Justice reads it in the former sense, but I do not so read it. The expression "legal measures" may mean "legal proceedings;" but it does not necessarily mean that; it may mean,

1861.
 The QUEEN
 v.
 Commissioners
 of Port of
 SOUTHAMPTON.

for instance, an application to an attorney ; and, after the general averments contained in this writ, I think it should not be understood as meaning "legal proceedings." In construing instruments of this nature we must read them as if they contained the words "reasonable and proper." It would be unreasonable to direct the defendants to bring an action against the Dock Company without receiving an indemnity ; and the doubt I entertained in this case was whether the writ ought not to have directed them to do so on receiving such an indemnity. But I think the general form of writ here adopted is the proper one—that it is better pleading not to specify with such particularity what is to be done ; and if the fact were that no such indemnity was offered, that is matter of return.

(HILL J. had left the Court.)

BLACKBURN J. After much doubt I have come to the same conclusion as my brother *Crompton*. The return to this mandamus I consider clearly bad ; although I confess it discloses a good deal of matter which, if brought before the Court when it was discretionary to grant the writ or not, would have influenced my mind very much. But that time has gone by, and the only question we have now to determine is the question of pleading, namely, what is the meaning of the expression in this writ that the defendants are to "take the necessary and legal measures and proceedings for obtaining and recovering payment of" this money. Looking at these statutes, I have no doubt that they impose on the Commissioners the legal duty of levying this money, and paying over to the corporation one fifth of the sum

levied; and I cannot agree with Mr. *Lush* that the Commissioners are in this respect merely trustees, and that the only remedy of the corporation against them is by proceedings in equity. Under these circumstances, therefore, is this writ too large? I think not, and that my brother *Crompton* has put the matter on its true ground; that such a writ may be in very general terms, directing the parties to take the legal and proper steps for a particular purpose, and that it is for the defendants to shew, by return, reasons for not obeying it; as, for instance, that the expence of doing so would be one which it would be improper to impose upon them. If in writs of this nature it were necessary to negative by anticipation everything that might possibly excuse obedience, the effect would be to render them intolerably prolix.

I also regret to be compelled to decide this case on the technical construction of the pleadings.

Judgment for the Crown.

1861.

The QUEEN
v.
Commissioners
of Port of
SOUTHAMP-
TON.

The QUEEN *against* WILLMOTT.

Monday,
April 22d.

1. On a summary conviction, under stat. 39 & 40 G. 3. c. 89. s. 18., for unlawful possession of naval stores, the Commissioner (or Superintendent, since stat. 2 & 3 W. 4. c. 40. ss. 10., 11.), or justice of the peace, has power, in the alternative, either to inflict a fine or to imprison with hard labour without imposing a fine.

2. Quære whether, in the latter event, an appeal to the Quarter Sessions is given by sect. 21 of that statute?

3. The pendency of an appeal under that section has not the effect of suspending the operation of the sentence.

4. Summary convictions under that statute are not affected by stat. 11 & 12 Vict. c. 43.

Unlawful
possession of
marine stores.
Summary
conviction.

Appeal.
39 & 40 G. 3.
c. 89. and 2 & 3
W. 4. c. 40.
11 & 12 Vict.
c. 43.

PRENTICE, in this Term, had obtained a rule calling on the Captain Superintendent of, and resident at, Her Majesty's Dock Yard at *Chatham*, to shew

1861.
The QUEEN
v.
WILLMOTT.

cause why a writ of habeas corpus should not issue, directed to the keeper of the House of Correction at *St. Augustine's*, in the county of *Kent*, to bring up the body of one *William Willmott*, &c. And why, if the rule be made absolute, *W. Willmott*, without being brought personally before this Court, should not be discharged out of that custody as to his commitment thereto, under and by virtue of the warrant of the Superintendent, dated 6th *April*, 1861: or why *W. Willmott*, having duly entered into a recognizance to prosecute an appeal against his conviction, should not be discharged out of that custody. Notice of the rule to be given to the Superintendent, and to the solicitor to the Admiralty.

The facts were these. An information under stat. 39 & 40 *G. 3. c. 89.* was laid before the Superintendent of Her Majesty's Dock Yard at *Chatham*, against the defendant, a marine store dealer at *Chatham*, for unlawfully having in his possession certain naval stores &c. of a value not exceeding 20*s.* The case was heard on 6th *April*, 1861, when the defendant was summarily convicted; and, in lieu of imposing a fine, the Superintendent adjudged him to be imprisoned and kept to hard labour in the House of Correction at *St. Augustine's*, near *Canterbury*, for three calendar months, to which place he was forthwith conveyed and there detained, under a warrant of commitment issued by the Superintendent.

It was stated by affidavit, that the defendant was possessed at *Chatham* of sufficient goods and chattels whereupon to levy by distress the highest amount of fine (namely 10*l.*) which the Superintendent had power to impose for the offence, and that the defendant had never stated that he was unable to pay the fine.

The defendant gave no notice of appeal against his conviction; but afterwards, on the 10th *April*, 1861, while in prison, he was visited by a justice of the peace for the county of *Kent*, before whom he entered into a recognizance with sureties, in treble the value of the highest fine that could be imposed for his offence, to prosecute the appeal at the next Quarter Sessions of the peace for *Kent*. An appeal was there entered accordingly, and resided to the *July* Sessions.

1861.

The QUEEN
V.
WILLMOTT.

The present rule was obtained on two grounds. 1. That the Superintendant had no jurisdiction to award imprisonment in the first instance; his power being limited to inflicting a fine, and committing to prison in the event of the fine not being paid, and the offender not being possessed of any effects out of which it could be levied by distress. 2. That the defendant was entitled to his discharge, having entered into a recognizance to appeal against the conviction.

The question in the case depended on the following sections of stat. 39 & 40 *G. 3. c. 89.*, "For the better preventing the embezzlement of His Majesty's naval, ordnance, and victualling stores;" as modified by stat. 2 & 3 *W. 4. c. 40. ss. 10 and 11.*

Stat. 39 & 40 *G. 3. c. 89. s. 18.* "Whereas it might tend to prevent the commission of offences if power were given to the Commissioners of His Majesty's navy, ordnance, and victualling, and His Majesty's justices of the peace out of Sessions, to hear and determine offences in a summary way in cases where the stores found are of small value, and to fine or otherwise punish the offenders accordingly; be it enacted &c., that from and after the passing of this Act, it shall and may be lawful to and for any principal officer or commissioner of the navy, ordnance, or vic-

1861.

The QUEEN
v.
WILLMOTT.

tualling for the time being, or any justice of the peace for any county, division, city, town corporate, liberty, or place within this kingdom, to hear and determine any complaint against any person or persons (not being a contractor or contractors, or employed as aforesaid) for unlawfully selling or delivering, or causing or procuring to be sold or delivered, or for receiving or having in his, her, or their custody, possession, or keeping, or for concealing any stores of war, or naval, ordnance, or victualling stores or goods, marked with such marks respectively as are hereinbefore mentioned, of any value in the whole not exceeding 20s.; which said Commissioner or justice respectively is hereby authorized and required, upon any information exhibited or complaint made in that behalf, at any time within three calendar months next after any such offence shall have been committed, to cause the party or parties accused to be apprehended and brought before him; or if he, she, or they shall have absconded, or cannot be found, then to be summoned to appear before such Commissioner or justice, by a notice or summons left at his, her, or their last or usual place of abode; and also to cause the witnesses on either side to be summoned; and such Commissioner or justice shall examine into the matter of fact, and upon due proof made thereof, either by the voluntary confession of the party or parties, or by the oath of one or more credible witness or witnesses, (which oath the said Commissioner or justice respectively is hereby authorized to administer,) give judgment or sentence accordingly; and in case the party or parties accused shall be convicted of such offence, then it shall and may be lawful to and for such Commissioner or justice of the peace respectively to inflict a fine of 10l.

upon him, her, or them, for such his, her, or their offence; which said fine so inflicted shall be divided and distributed, one moiety thereof to the informer or discoverer of the offence, and the other moiety thereof (the necessary charges for the recovery thereof being first deducted) to the treasurer of His Majesty's navy or ordnance, as the case may be &c., and to award and issue out his warrant under his hand and seal for levying such fines so adjudged on the goods of the offender or offenders, and to cause sale to be made thereof for payment of such fine and the reasonable charges of distress, (to be judged of by such Commissioner or justice respectively,) in case they shall not be redeemed within six days, rendering to the party the overplus, if any; and where sufficient goods of the party cannot be found to answer the said fine, to commit the said offender or offenders to the common gaol of the county, division, city, town corporate, liberty or place, for the space of three calendar months, unless such fine shall be sooner paid, or in lieu of such fine to cause such offender or offenders to be imprisoned and kept to hard labour in the House of Correction for the space of three calendar months, as to such Commissioner or justice of the peace respectively shall be thought fit." It then enacts that every such Commissioner or justice shall cause the amount of every such last mentioned moiety of fine which he shall so receive, &c. to be paid into the hands of the treasurer of the navy or ordnance &c.

Sect. 19. "It shall and may be lawful to and for the said Commissioner or justice before whom any person shall be convicted in a summary way as aforesaid (if he shall see cause), to mitigate and lessen any such before mentioned fine of 10*l.*, to be inflicted in that behalf as

1861.

The QUEEN
V.
WILLMOTT.

1861.
 The QUEEN
 v.
 WILLMOTT.

he shall think fit, (the reasonable costs of the officers and informers, as well in making the discovery as in prosecuting the same, being always allowed over and above such mitigation,) and so as such mitigation do not reduce the fine to less than one moiety of the said sum of 10*l.*, over and above the said costs and charges" &c.

Sect. 20. "Provided also, and be it enacted that, in case such Commissioner or justice of the peace shall, upon the hearing and determining of such complaint as aforesaid, adjudge the offender or offenders, in lieu of a fine, to be imprisoned and kept to hard labour as aforesaid, that then the informer, or person or persons who shall have discovered such offender or offenders, shall have and receive, as a reward for such his, her, or their discovery, the sum of 5*l.* for every such offence so discovered," &c.

Sect. 21. "If any person or persons shall find himself, herself, or themselves aggrieved by the judgment of any such Commissioner or justice, touching or concerning any such stores as last aforesaid, under the value of 20*s.*, then he, she, or they shall or may, upon entering into a recognizance to His Majesty, with one or more surety or sureties, to the satisfaction of such Commissioner or justice, to the amount of treble the value of such fine, appeal to the justices of the peace at their next general Quarter Sessions of the peace for the county, division, city, town corporate, liberty, or place wherein the offence was committed, who are hereby empowered to summon and examine witnesses upon oath, and finally to hear and determine the same; and, in case the judgment shall be affirmed, it shall and may be lawful for such justice of the peace to award the

person or persons so appealing to pay such costs occasioned by such appeal as to them the said justices shall seem meet, and to enforce payment thereof, according to the course and practice of such Court."

1861.

The QUEEN
v.
WILLMOTT.

Stat. 2 & 3 W. 4. c. 40. s. 10. Certain officers, to be called "Superintendants," "shall have full power and authority to do, execute, and perform all and every the duties, matters, and things which by any Act or Acts of Parliament now in force any Commissioner of the navy or victualling resident at any naval or victualling yard or establishment, or at any naval hospital, at home or abroad, is authorized or required to do."

Sect. 11. "The Superintendants so to be appointed shall have and they are hereby invested with full power and authority to administer oaths, and to exercise the duties, powers, and authorities of justices of the peace, in all places whatever, and in all matters relating to His Majesty's naval service, and to the stores, provisions, ammunition, and the accounts thereof, and in all other cases whatever in which any Commissioner of the navy or victualling is empowered to act as a justice by any Act or Acts now in force, in as full a manner to all intents and purposes as if such Superintendants had been named in any such Act or Acts, or in any commission of the peace for any such places" &c.

Collier and H. W. West now shewed cause. First, the Superintendant is empowered in the alternative *either* to inflict a fine, and if it is not paid, and no goods are found on which a distress can be made, imprison without hard labour; *or* to imprison with hard labour, without imposing any fine at all. The Admiralty officers say that this is the usual practice, and it is also in accordance with the

1861.
 The QUEEN
 v.
 WILLMOTT.

language of the statute. The 18th section begins by reciting that it is expedient to give power to the Commissioner to “fine or otherwise punish.” It then gives power to impose a fine, and after providing that half of the fine shall go to the informer, and making provision for the mode of levying it, adds, “or *in lieu of such fine* to cause such offender to be imprisoned and kept to hard labour in the house of correction” &c. This construction is confirmed by the 19th and 20th sections; the former clearly referring to cases where a fine is imposed, and the latter making provision to reward the informer where there is imprisonment “in lieu of fine.” There is good reason for this. The object of the statute was to prevent the embezzling of the Queen’s stores of war, by giving to the Commissioner or justice of the peace a power of summarily convicting. But, as this is an offence the enormity of which varies considerably, being sometimes of great malignity—indeed the benefit of clergy was taken away from it by stat. 22 C. 2. c. 5., recited in the present Act—and sometimes very slight, as where it is not committed with fraudulent intent, it is desirable that the judge by whom the matter is determined should have a discretionary power to consider all the circumstances; and to punish the milder cases by fine &c., and the more serious ones by imprisonment with hard labour.

Secondly, the right of appeal given by this statute extends to those cases only where a fine is imposed. This appears from the language of the 21st section, which gives that right solely on condition of the party entering into recognizances “to the amount of treble the value of such *fine*.” Besides, the recognizance must be given to the satisfaction of the Commissioner or justice before

whom the conviction takes place, whereas here it was taken by another justice from the defendant when in prison. [Cockburn C. J. That last circumstance certainly seems an answer to the defendant on the second point.]

1861.

THE QUEEN
V.
WILLMOTT.

Prentice, contra. As to the first point: this is a highly penal statute, and ought to be most strictly construed in favorem libertatis. Its effect is to give a power of summary conviction, entailing a sentence of imprisonment with hard labour; and, in the majority of cases, virtually without appeal, as the time of imprisonment would most usually expire before an appeal could be heard. The statute should be construed as vesting in the Commissioner or justice of the peace the power of summarily convicting given to justices of the peace by many statutes, and in later times by the general Act, 11 & 12 Vict. c. 43. ss. 19, 20, 21: the effect of which is to enable them to impose a small fine, and, if the offender can not pay it, to imprison him with or without hard labour. There is no injustice in this, for the fact of a man being unable to pay a small fine proves him a vagrant. In 1 *Burn Just.* 786, 29th ed., tit. *Commitment in Execution*, it is said: "If a statute assigns a commitment as a mode of punishment in the first instance, the commitment follows upon and is the legal consequence of the punishment. But where it is assigned merely as a subsidiary to the enforcing a punishment or penalty, the magistrate cannot adopt it till he has ascertained the punishment or penalty cannot be enforced."

As to the second point: the 21st section of this statute gives appeal "if any person shall find himself aggrieved

1861.

The QUEEN
v.
WILLMOTT.

by the judgment of the Commissioner" &c. In *Rex v. Brooke* (a) this Court held that a justice of the peace had no power to bail a person who had appealed against a committal under the Vagrant Act: but the reason was, that in the event of the appeal being decided in favour of the respondents the justice had no power to commit him; a difficulty which has been removed by stat. 11 & 12 Vict. c. 43. s. 27. [*Cockburn C. J.* In construing this statute we must go by the law as it stood at the time when it was passed. Stat. 11 & 12 Vict. c. 43. was long subsequent. *Crompton J.* *Kendall v. Wilkinson* (b), cited in *Paley on Convictions*, p. 304, 4th ed., is strong authority to shew that the effect of a commitment by a justice of the peace is not suspended by the mere fact of appeal. That case was subsequent to stat. 11 & 12 Vict. c. 43.] It is a great hardship on a party.

COCKBURN C. J. I am of opinion that this rule ought to be discharged. It is certainly no easy task to construe an enactment framed like that before us. Nothing can be more obscure or confused than the language of sect. 18; but, on the whole, the more reasonable construction is to hold that, on proof of the offence, the Commissioner (for whom the Superintendent is now substituted) has power in the alternative; *either* to inflict a fine not exceeding 10*l.*, and in the absence of payment and of goods and chattels to answer the fine, imprison for three months or until it is paid, *or*, without imposing any fine at all, to sentence the offender to three months imprisonment with hard labour.

The introductory part of the 18th section, which

(a) 2 T. R. 190.

(b) 4 E. & B. 680.

speaks of the expediency of enabling the Commissioner to fine or *otherwise punish*, reads as if the Legislature contemplated that he should have power to punish otherwise than by fine. It is true that when we come to the enacting part of the section there is considerable difficulty; for, after enacting that the Commissioner may inflict a fine &c., it empowers him, "in lieu of such fine," to cause the offender to be imprisoned and kept to hard labour. The words "*in lieu of such fine*," taken in their ordinary acceptation, seem to support the supposition that the Legislature intended that a fine should be imposed in the first instance, and that, in the event of its not being paid, imprisonment should follow. On the other hand, however, it is difficult to suppose the intention of the Legislature to have been that if a distress warrant issues for the fine, and no goods or chattels are found to satisfy it, imprisonment without hard labour is to follow, while, on the other hand, if the Commissioner thinks it inexpedient to issue a distress warrant, he may, under the same circumstances, and with the same degree of delinquency before him, award imprisonment with hard labour. I therefore think that the true construction of this section, and that which will go farther than any other to reconcile the whole enactment with common sense, is to hold that the Legislature meant that the Commissioner should exercise his judicial discretion in the first instance—*either* to inflict a fine; in which event he is to have power to issue a distress warrant, and if no effects are found to satisfy it, then with the alternative of imprisonment without hard labour; *or* to adjudge imprisonment with hard labour, without any alternative at all.

Considerable difficulty also arises on the appeal clause.

1861.

THE QUEEN
v.
WILLMOTT.

1861.
 The QUEEN
 v.
 WILLMOTT.

In the first place it is not plain that it was the intention of the Legislature to give an appeal at all under circumstances like the present. The right to appeal is only given on the party entering into recognizance to treble the amount of the *fine*; though possibly that may be construed to apply not only to cases where a fine is inflicted, but also to those where imprisonment is awarded in lieu of fine. We need not, however, decide the question; for, even supposing an appeal would lie under these circumstances, what we are asked to do is to discharge the defendant out of custody. It is urged that we can do this under stat. 11 & 12 *Vict.* c. 43.; but I find no such provision in that statute, the 27th section of which merely enacts that, in the event of the appeal against a conviction being decided against the appellant, the justice may issue his warrant to carry the sentence into execution. In the present case the warrant of commitment has already been issued, and execution carried into effect.

I cannot conclude without expressing my great regret that in the administration of criminal justice we have to interpret a statute so ill drawn as that before us. Seeing a distinguished member of the Legislature and of the Profession present, I hope this statute will not be allowed to remain in the present form on the statute book, but that measures will be taken to render it plain to those who have to administer it.

CROMPTON J. On consideration, I also am of opinion that this conviction is good. That is the first question we have to decide. It is argued that the Superintendant was wrong in not inflicting a fine in the first instance and, if it were not paid, then awarding imprisonment for

three months. When the present rule was moved, the question appeared to me so difficult that I thought we might have to decide it by applying the principle that, where a Court cannot see its way in the construction of a penal statute, it must give its doubt in favour of the prisoner. But, looking at this statute, I think it meant to give the Commissioner (now the Superintendant) power in the alternative to fine or imprison, according to the magnitude of the offence; and the construing it otherwise would lead to the very great absurdity pointed out by my Lord. Besides, I think the 20th section extremely strong to the same effect, for it provides, "In case such Commissioner &c. shall, upon the hearing and determining of such complaint, adjudge the offender in *lieu of a fine* to be imprisoned and kept to hard labour" &c. This evidently does not refer to the case where a fine has been awarded and there is a return of no goods, but means that he may do so on the original hearing. The only answer to that is the appeal clause, the 21st section; and if it be true that no appeal is given when hard labour is awarded, it would look much, at first view, as if the Legislature meant that a fine should be imposed in the first instance. But I doubt if that is the meaning of that section. It says, "If any person shall find himself aggrieved by the judgment of any such Commissioner or justice &c., he may, upon entering into a recognizance &c., appeal to the justices of the peace at their next general quarter sessions." I think that shews there is an appeal in the one case as well as the other. Then, however, comes the further question, suppose an appeal is given, can we discharge the prisoner? The late cases are very clear that, although an appeal against a conviction is given by statute, it does

1861.

THE QUEEN
V.
WILLMOTT.

1861.
 The QUEEN
 v.
 WILLMOTT.

not in general suspend the effect of the warrant of commitment; for that we need only look to *Kendall v. Wilkinson* (a). No doubt it is a great hardship on a party that the law should be so, especially where his liberty depends on the construction of a statute drawn as this is,

HILL J. I am of the same opinion, and for the same reasons.

BLACKBURN J. I am of the same opinion. I agree in the construction which has been put on the 18th section by the rest of the Court; and on this subject will merely add that, in order to render the whole perfectly plain, we need only alter the punctuation, which is no part of the statute. After the words "inflict a fine &c. for such his, her, or their offence," there is a semicolon; the section then provides for enforcing the fine, and gives power to award imprisonment for three calendar months, "unless such fine shall be sooner paid," after which word "paid" there is a comma; and the section then goes on to say, "or in lieu of such fine, to cause the offender to be imprisoned and kept to hard labour &c. for three calendar months." We have only to strike out the semicolon after the word "offence," and put a comma instead, and then put a semicolon instead of a comma after "paid," and all becomes clear.

But there is great difficulty in construing the 21st section. I am inclined to think that its effect is to give an appeal in all cases; but, even if that be so, an appeal has not in general the effect of suspending the sentence; at all events there is nothing in this statute which gives

it that effect. According to *Kendall v. Wilkinson* (a) it is a question of great general importance whether stat. 11 & 12 *Vict. c. 43.* gives such effect to an appeal; and if I thought that that statute applied I should like to take further time for consideration. But here the conviction is not before a justice of the peace, but before a Superintendant, under stats. 39 & 40 *G. 3. c. 89.* and 2 & 3 *W. 4. c. 40.*, and I do not think stat. 11 & 12 *Vict. c. 43.* applies to such a case at all.

1861.

The QUEEN
v.
WILLMOTT.

Rule discharged.

(a) 4 *E. & B.* 680.

The GREAT INDIAN PENINSULA Railway
Company against SAUNDERS.

Wednesday,
April 24th.

Marine insurance.
Particular average.
Partial loss.
Expense of forwarding goods.

1. Where goods are insured by a policy of marine insurance in the ordinary form, the expression "warranted free from particular average" is not confined to losses arising from injury to, or deterioration of, the goods themselves; but is equivalent to a warranty against total loss and general average only; and, consequently, includes expences incurred in relation to the goods.

2. A quantity of iron rails was shipped to be carried to a certain place, for a sum to be paid here, ship lost or not lost. The shippers insured them by a policy in the ordinary form "warranted free from particular average, unless the ship be stranded, sunk or burnt." The ship was neither sunk, stranded nor burnt; but there was a constructive total loss of her by perils of the sea. The rails were saved, and sent on in other vessels to their destination, for which the insured was compelled to pay freight to an amount not exceeding the value of the rails. Held, that this freight was not recoverable under the policy.

3. Quere, whether an underwriter on a policy against total loss only, with the usual clause authorizing the assured to sue and labour for the preservation of the subject matter of the insurance, is liable for expences incurred by the assured for the purpose of rescuing the subject matter of the insurance from a state of peril, which might have resulted in a total loss, but did not?

THE following case was stated, without pleadings, by consent and by order of a Judge, under The Common Law Procedure Act, 1852.

1861.

GREAT
INDIAN
PENINSULA
Railway
Company
v.
SAUNDERS.

In *November*, 1858, the plaintiffs shipped at *London* on board *The Bombay* bound for *Kurrachee* and *Bombay*, with leave to call at *Cork* for troops, about 480 tons of iron rails, to be conveyed to *Bombay* for the plaintiffs, upon the terms of the following bill of lading.

“Shipped in good order and well conditioned, by *The Great Indian Peninsula Railway Company*, in and upon the good ship called *The Bombay*, whereof is master for the present voyage *Hamanck*, and now riding at anchor in the river *Thames*, and bound for *Bombay*, with liberty to land passengers at *Kurrachee*, 1995 bars railway iron, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of *Bombay* (the act of God, the Queen’s enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation of whatever nature and kind soever excepted, save risk of boats as far as ships are liable thereto) unto the secretary of the said Company, or to his assigns, freight for the said goods, to be paid here, ship lost or not, with primage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to four bills of lading, all of this tenor and date, the one of which bills being accomplished the others to stand void. Dated in *London*, 2d *November*, 1858. Weight and contents unknown to

Thomas Hamanck.”

In the margin were inserted the particulars of the rails, together with this note. “Weight, contents and value unknown, and not answerable for leakage, breakage or rust, nor loss by vermin. *E. Gellatt*, for *D. Dunbar.*”

On the 2d day of *November*, 1858, the plaintiffs paid to the owners of *The Bombay* the sum of 629*l.* 9*s.* 10*d.*

for freight on the rails mentioned in the bill of lading, being at the rate of 25s. per ton.

On the 11th day of *November*, 1858, the plaintiffs effected a policy of insurance at *Lloyd's* for the sum of 4500*l.* on rails valued thereat, "warranted free from particular average, unless the ship be stranded, sunk or burnt. General average payable according to foreign statement" &c. The defendant subscribed this policy for the sum of 150*l.*

The sum of 4500*l.* mentioned in the policy as the value of the rails included their first cost, and also the above mentioned freight, as well as the insurance and shipping charges.

Soon after *The Bombay* sailed she experienced very heavy gales, had all her masts carried away by tempests, became entirely disabled, and was eventually towed into *Plymouth*, on *December* 5th, 1858, by Her Majesty's ship *Argus*. On her being surveyed, it was ascertained that the expence of repairing her would exceed her value when repaired, and thereupon notice of abandonment of the voyage was given to the shippers by the ship-owners, and she was shortly afterwards broken up; the expence of repairing her being an expence which no reasonable person would have incurred.

The iron rails which the plaintiffs had shipped in *The Bombay* were without delay taken out of her by the plaintiffs, and by them shipped to *London*, and there shipped by the plaintiffs on board three other vessels. At the time of that shipment the rates of freight had risen, and the plaintiffs were compelled to pay freight at the rate of 30s. per ton on the rails shipped in one of them, and of 40s. per ton on those shipped in the other two, such freights amounting in the whole to

1861.

GREAT
INDIAN
PENINSULA
Railway
Company
v.
SAUNDERS.

1861.

GREAT
INDIAN
PENINSULA
Railway
Company
v.
SAUNDERS.

825*l.* 11*s.* 7*d.* The three vessels into which the rails were shipped arrived in due course at *Bombay*, with the rails on board in safety.

The question for the opinion of the Court was, whether the defendant, as one of the underwriters, was liable to pay to the plaintiffs his proportion of that sum of 825*l.* 11*s.* 7*d.*, or any part thereof.

The case was argued, on the 23d *April*, before *Crompton, Hill* and *Blackburn Js.*

Edward James, for the plaintiffs. The plaintiffs are entitled to recover, unless the loss sustained by them in being obliged to pay this extra freight comes within the exception in the policy "free from particular average." "Particular average" means losses arising from injury to or deterioration of the goods themselves; whereas here the plaintiffs seek to recover money paid by them to prevent a total loss of the goods by perils of the seas, a contingency which is insured against by the policy. The question as to the precise meaning of "particular average" is a very important one, on which no decision is to be found in this country; but it is otherwise in *America*, and the subject has been discussed in works of authority. In *Stevens & Benecke on Average* (*American* edition, 1833), p. 341, it is said, "the term 'particular average' denotes, in general, every kind of expence or damage, short of a total loss, which regards a particular concern, and which is to be borne by the proprietor of that concern alone. As between the assured and the underwriter, it means losses of this description, as far as the underwriter is liable. . . . And although in the law all kinds of *expences*, short of a total loss, are recoverable under the head of

average: yet there is this difference, (at least in this country) between a deterioration in value of the thing insured, or particular average in a stricter sense, and expences incurred for the preservation of the samething, that such expences may be claimed, although there be no claim for particular average, either because the policy was warranted free from particular average, or because the per centage was short of that for which the underwriter becomes liable." In *Arnould on Insurance*, vol II., p. 814, 2d ed., it is said: "As a general principle, the underwriter on one subject of insurance has nothing to do with losses, charges, or contributions imposed upon it by reason, or on account of, another. Thus the underwriter on *goods* has nothing to do with *freight*; all that he insures being the safe arrival of the goods: hence, it is a well established principle in the law of marine insurance, that, though sea damaged goods, if they arrive in specie or in bulk, pay the same freight as though they arrived sound, the underwriter on *goods* cannot be charged with the detriment the merchant thus sustains by having to pay the same freight on a diminished value, nor can he be charged with any *pro ratâ* freight the merchant may have to pay the shipowner; although it seems doubtful whether he may not be charged, under certain circumstances, with the *increased freight* which the merchant is obliged to pay the shipowner in case of transshipment, when the freight by the substituted exceeds that by the original ship:" referring to *Shipton v. Thornton* (a). And, p. 872, "Amongst the commodities which are the subject of marine insurance, it is obvious that there are many which are liable to be deteriorated in a much greater degree than others by the effect of the perils

1861.

GREAT
INDIAN
PENINSULA
Railway
Company
v.
SAUNDERS.

(a) 9 A. & E. 336, 7

1861.
 GREAT
 INDIAN
 PENINSULA
 Railway
 Company
 v.
 SAUNDERS.

particular average, says, "The very object of the exception is to free the underwriters from liability for damaged goods. They say in effect that they will be liable if the goods are wholly lost, but not if they are only damaged." 1 *Marsh. Insurance*, 165, 3d ed.: "If in the course of the voyage, the ship be disabled, by stress of weather, or any other peril of the sea, the captain ought to hire another vessel for the transport of the goods, and proceed on the voyage, if, under all the circumstances of his situation, it be for the interest of all concerned that he should do so. In such case, as the law is understood in *France*, the insurers shall pay all average losses on the goods, the expence of salvage, unloading, warehousing, and reloading, together with all duties that may have been paid, and the increase of freight, if any. In short, they must bear every expence which is the necessary consequence of changing the ship." In *Maude and Pollock on Merchant Shipping*, 278, 2d ed., note (h), "*Simple or particular average* arises where any damage is done to the cargo or vessel by accident or otherwise, such as the loss of an anchor or cable, the starting of a plank, the turning sour of a cargo of wine, which are all losses which rest where they fall. This expression, as applied to losses of this description, has been said to be inaccurate; but the term *average* appears strictly not to imply any more than a *damage*." [He also referred to *Rosetto v. Gurney* (a), *Duff v. Mackenzie* (b); and *Blackburn J.* referred to *Chapman v. Benson* (c), affirmed in Dom. Proc. (d). *Crompton J.* I have always understood that, as applied to goods, "par-

(a) 11 C. B. 176.

(b) 26 L. J. C. P. 313. Also reported 3 C. B. N. S. 16.

(c) 5 C. B. 330.

(d) 2 H. L. Ca. 696.

ticular average" and "partial loss" mean the same thing; and I think you will find it so stated in *Park on Insurance* (a). You want to make out that there is a kind of loss of goods which is neither total nor partial.] This question has been much ventilated in *America*. In *Mumford v. The Commercial Insurance Company* (b), where goods insured were captured during the voyage, and the vessel was released; but the goods were detained for further proof, and were afterwards restored on payment of the full freight; but the owner was obliged to hire another vessel to carry them to their place of destination; it was held that the insurer was liable to pay this additional or increased freight, being an expence necessarily incurred in consequence of the capture. [He also cited *Searle v. Scovell* (c). *Crompton J.* I do not think that *Mumford v. The Commercial Insurance Company* (b) helps you; for *Kent C. J.* treats the question before him as one of a loss or general average.] At all events the plaintiffs are entitled to recover under the clause which authorizes the assured to sue and labour for the preservation of the subject matter. In 2 *Phillips on Insurance*, 464 (3d ed.), § 1777, it is said, "Suppose the case of an impending total loss of articles insured free of average, and expences incurred to avert it; are these expences within the exception, and to be borne by the assured? or are the underwriters liable for them, on the ground that they were incurred to prevent a total loss for which they would have been liable?" He cites some authorities in which this question was presented, but not discussed: and adds, "Expence incurred to prevent a

1861.

GREAT
INDIAN
PENINSULA
Railway
Company
v.
SAUNDERS.

(a) See vol. 1. chap. vi.

(b) 5 *Johns. (U. S.) Rep.* 262.(c) 4 *Johns. Ch. Rep. (American)* 218.

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but she was neither stranded, sunk, nor burnt. The rails—the subject matter of the insurance—were saved, and were sent on in other vessels to their destination; and, in order to forward them to their destination, it was necessary to pay freight to the extent of 825*l.* 11*s.* 7*d.* As the original contract of carriage was for a sum to be paid here, ship lost or not lost, the whole of this sum of 825*l.* 11*s.* 7*d.* was an extra expence incurred by the shippers of the goods, in consequence of the sea risk which had frustrated the voyage of *The Bombay*; and the question we have to determine is, whether the insured can recover this sum on a policy containing this warranty.

In *Mumford v. The Commercial Insurance Company* (a), cited 1 *Phill. on Insurance*, 678, 3d ed., the insured on a policy, in which there was no warranty against particular average, recovered in the Courts of *New York* on a claim similar to this. No such decision has been come to in the Courts of this country; and we are not called upon in this case to determine whether, in the absence of such a warranty, the party could or could not recover; for we are of opinion that, if he could recover, it would be on the ground that the disbursement for the extra freight was part of the loss occasioned to the owner of these particular goods by the perils of the seas, or, in other words, a particular average on these goods; and, therefore, within the warranty.

Mr. *James* contended that “particular average” bore a more restricted meaning—that it was confined to losses arising from injury to, or deterioration of, the goods themselves, and did not include expences incurred in relation to the goods: but we find no authority for

1861.

GREAT
INDIAN
PENINSULA
Railway
Company
v.
SAUNDERS.

(a) 5 *Johns. Rep.* (U. S.) 262.

1861.

GREAT
INDIAN
PENINSULA
Railway
Company
v.
SAUNDERS.

total loss of an article insured free from partial loss seems properly to come under the liability to 'sue, labour, and travel' at the expence of the underwriters, which the underwriters ought to be liable to reimburse on such articles no less than on others."

Honyman was proceeding to argue the case on the part of the defendant, when

The Court said that they would, if necessary, hear him on a future day. They added that the point raised was one of some novelty in this country; and that, although they did not entertain any doubt about it, they deemed it right to deliver their opinion in a formal judgment.

Cur. adv. vult.

The judgment of the Court was now delivered by

BLACKBURN J. In this case the plaintiffs insured themselves by the ship *Bombay*, on a voyage to *Kurrachee* or *Bombay*, by a policy in the ordinary form of a *Lombard Street* policy, on "rails valued at 4500*l.*, warranted free from particular average; unless the ship be stranded, sunk, or burnt." It is upon this warranty that our judgment depends.

It appears, by the statement in the special case, that the goods were shipped on board *The Bombay*, to be carried on the voyage for a sum, inaccurately called freight, to be paid here, ship lost or not lost. The ship was, by perils of the seas, disabled and obliged to put into *Plymouth*, in such a state that she was not worth repairing; and no doubt, therefore, there was what is commonly called a constructive total loss of the ship;

but she was neither stranded, sunk, nor burnt. The rails—the subject matter of the insurance—were saved, and were sent on in other vessels to their destination; and, in order to forward them to their destination, it was necessary to pay freight to the extent of 825*l.* 11*s.* 7*d.* As the original contract of carriage was for a sum to be paid here, ship lost or not lost, the whole of this sum of 825*l.* 11*s.* 7*d.* was an extra expence incurred by the shippers of the goods, in consequence of the sea risk which had frustrated the voyage of *The Bombay*; and the question we have to determine is, whether the insured can recover this sum on a policy containing this warranty.

In *Mumford v. The Commercial Insurance Company* (a), cited 1 *Phill. on Insurance*, 678, 3d ed., the insured on a policy, in which there was no warranty against particular average, recovered in the Courts of *New York* on a claim similar to this. No such decision has been come to in the Courts of this country; and we are not called upon in this case to determine whether, in the absence of such a warranty, the party could or could not recover; for we are of opinion that, if he could recover, it would be on the ground that the disbursement for the extra freight was part of the loss occasioned to the owner of these particular goods by the perils of the seas, or, in other words, a particular average on these goods; and, therefore, within the warranty.

Mr. *James* contended that “particular average” bore a more restricted meaning—that it was confined to losses arising from injury to, or deterioration of, the goods themselves, and did not include expences incurred in relation to the goods: but we find no authority for

1861.

 GREAT
 INDIAN
 PENINSULA
 Railway
 Company
 v.
 SAUNDERS.

(a) 5 *Johns. Rep.* (U. S.) 262.

1861.

GREAT
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PENINSULA
Railway
Company
v.
SAUNDERS.

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1861.

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v.
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1861.
 GREAT
 INDIAN
 PENINSULA
 Railway
 Company
 v.
 SAUNDERS.

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1861.
GREAT
INDIAN
PENINSULA
Railway
Company
v.
SAUNDERS.

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Rep. (U. S.) 262.

1861.

GREAT
INDIAN
PENINSULA
Railway
Company
v.
SAUNDERS.

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1861.

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1861.

GREAT
INDIAN
PENINSULA
Railway
Company
v.
SAUNDERS.

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1861.

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INDIAN
PENINSULA
Railway
Company
v.
SAUNDERS.

(a) 5 *Johns. Rep.* (U. S.) 262.

1861.

GREAT
INDIAN
PENINSULA
Railway
Company
v.
SAUNDERS.

this. In *Arnold on Insurance*, p. 970, (2d ed.), we find the definition of a particular average stated to be "loss arising from damage accidentally and proximately caused by the perils insured against, or from extraordinary expenditures necessarily incurred for the sole benefit of some particular interest, as of the ship alone, or the cargo alone." And the same learned author says, at p. 875, that an insurance on goods warranted free of average unless general, "is equivalent to an insurance against *their total loss only*;" which indeed necessarily follows from the definition already quoted. Mr. *Phillips*, in his *Treatise on Insurance*, § 1422, defines particular average to be, "a loss borne solely by the party upon whose property it takes place, and is so called in distinction from a general average, for which different parties contribute." The same learned author, in § 1767, says that an insurance against total loss only, and an insurance with the exception of particular average, are equivalent forms.

No case has been cited, nor are we aware of the existence of any, tending to shew that these definitions of particular average are inaccurate. We think that we must put the same construction on this policy as if it had been expressed to be "against total loss and general average only;" and, if so, it is self-evident that the claim in the present case cannot be in any way treated as a total loss, or a general average.

It was, however, further argued by Mr. *James*, that the plaintiffs were entitled to recover under the clause which authorizes the insured to sue and labour for the preservation of the subject matter of the insurance. It is not necessary to decide whether an underwriter on a policy against total loss only is, under this clause, liable

for expences incurred by the assured for the purpose of rescuing the subject matter of an insurance from a state of peril which might have resulted in a total loss, but did not. There are reasons both for and against this stated by Mr. *Phillips* in his *Treatise on Insurance*, § 1777; and the question seems never to have been actually decided. But in the present case it does not arise. The expences here were incurred for the purpose of forwarding the subject matter of insurance to its destination, at a time when the iron was not in any peril of total loss, either actual or constructive. Had the insured chosen, instead of paying this extra freight, to sell the rails in *England*, as he might have done if he pleased, he could have made no claim on the underwriters; for it would not have been a constructive total loss, according to *Rosetto v. Gurney* (a), unless the amount of the extra freight exceeded the value of the goods when forwarded, which is not the case here; and an actual total loss is out of the question.

It seems to us that the plaintiffs here cannot in any view recover, unless we deprive the warranty of the effect which it was intended to have. We therefore give judgment for the defendant.

Judgment for the defendant.

(a) 11 C. B. 176.

1861.

GREAT
INDIAN
PENINSULA
Railway
Company
v.
SAUNDERS.

1861.

Wednesday,
April 24th.

*Metropolis
Local Manage-
ment Acts.
Powers of new
vestry.
Appointment
of Governors
and Directors.*

The QUEEN, on the prosecution of the Churchwardens, Overseers, Governors and Directors of the poor of the parish of ST. JOHN, SOUTHWARK, respondents, *against* RENDLE, appellant.

The parish of *St. John's, Southwark* was, before and at the time of the passing of The Metropolis Local Management Act, 1855, 18 & 19 *Vict. c. 120.*, governed by local Acts, 26 *G. 3. c. cxiv.* and 5 *G. 4. c. lxxiv.* Under these local Acts the vestry of the parish was to appoint, annually, a select vestry, which select vestry was to nominate, annually, "Governors and Directors of the poor of the said parish," who were to make rates for the relief of the poor of the said parish.

Held, that the power to appoint the governors and directors was, since the passing of stat. 18 & 19 *Vict. c. 120.*, transferred to the new vestry directed to be appointed by that Act, either under sects. 8, 90, of that Act, or under sect. 3 of the amending Act, 19 & 20 *Vict. c. 112.*

ON appeal against a rate, made 5th *October*, 1859, for the relief of the poor of the parish of *Saint John, Southwark*, in the county of *Surrey*, a case was stated by consent, under an order of *Crompton J.*, and was substantially as follows.

The parish of *St. John* is a parish which, previous to the passing of The Metropolis Local Management Acts, was governed by certain local Acts, under the powers of which the above rate was duly made. By one of these Acts, 26 *G. 3. c. cxiv. (a) s. 1.* it is enacted that, at the annual meeting to be held in *Whitsun* week in each year, the "churchwardens and overseers, and vestrymen," or any eleven or more of them, shall nominate and appoint ten substantial and discreet persons, residing in the said parish," "who, together with the

(a) Local and personal, public. "For ascertaining and collecting the poor rates, and for better governing, regulating, maintaining and employing the poor in the parish of *St. John, Southwark.*"

churchwardens and overseers of the poor for the time being, shall be called Governors and Directors of the poor of the said parish ;” and “shall assemble and meet together” “from time to time, as often as occasion shall require ;” and at such meeting or meetings “shall, and they are hereby required to make one or more general and equal pound rate or rates, assessment or assessments, for the relief of the poor of and in the said parish, upon all and every person and persons who do and shall inhabit, hold, occupy, possess, or enjoy any land, ground, wharf, house,” “or any other species of property” rateable to the relief of the poor in the said parish, “according to the yearly rent or value thereof.”

1861.
The QUEEN
V.
RENDLE.

By another of those Acts, 5 G. 4. c. lxxiv. (a) s. 3., it is enacted “that within twenty days after the passing of this Act, a general meeting of the vestrymen of the said parish shall be convened,” “and all and every persons and person present at such meeting, and who shall respectively be rated to the relief of the poor of the said parish,” “upon a rental of seventy five pounds a year or upwards, for premises in his own occupation, and shall have actually paid the rates therein charged or imposed,” “shall then and there choose, nominate, elect, and appoint fifteen persons (each of whom shall be rated to the relief of the poor in sixteen pounds per annum or upwards, in one rental) to be select vestrymen for the said parish : and the other inhabitants present at such vestry, and who in and by the last poor rate assessment shall have been rated upon a rental not amounting to

(a) Local and personal, public. “To amend and enlarge the powers of several Acts, so far as the same relate to the right of voting at vestries of the parish of *St. John, Southwark*,” “and to establish a select vestry within the said parish.”

1861.
The QUEEN
v.
RENDLE.

seventy five pounds a year, and shall have actually paid the rates therein charged or imposed," "shall in like manner then and there choose, nominate, elect, and appoint fifteen other persons, each of whom shall be rated as aforesaid to the relief of the poor at not less than sixteen pounds per annum, to be select vestrymen for the said parish in conjunction with the other fifteen persons to be chosen, nominated, elected, and appointed as first hereinbefore mentioned; and such thirty persons shall be and be called 'select vestrymen,' and shall constitute the select vestry of the said parish" (with subsequent provisions for future annual elections in *Whitsun* week and for going out of office by rotation).

By sect. 11 of the last mentioned Act it is enacted "that at the said first and at every subsequent annual meeting of the said select vestrymen to be held after the passing of this Act, it shall be lawful to and for each of the said two respective sets of select vestrymen assembled at every such first and every subsequent annual meeting to be held after the passing of this Act, to nominate and appoint five substantial and discreet persons residing in the said parish," "which ten persons so to be elected as aforesaid, together with the churchwardens and overseers of the poor of the said parish for the time being, shall be called 'Governors and Directors of the poor of the said parish;' and such Governors and Directors shall and may have and exercise all the powers and authorities in respect to the making rates and assessments for the relief of the poor, and also for the better maintaining, governing, employing, and regulating the poor, and all other powers and authorities given to or vested in the Governors and Directors in and by the said recited Act of" 26 G. 3. c. cxiv.

Under the above Acts, or some or one of them, Governors and Directors of the poor of the said parish have always from time to time since the passing of those Acts been elected; and by them the poor rates of the said parish have always from time to time hitherto been made; and the above rate of 5th *October*, 1859, was made by them in the ordinary and usual way, and acting under the powers and provisions of the said Acts, so far as by law they could do; and the said rate, subject to the question raised, is in all respects a valid rate.

1861.

THE QUEEN
V.
RENDLE.

After the passing of the Metropolis Local Management Acts, 18 & 19 *Vict.* c. 120. and 19 & 20 *Vict.* c. 112., and pursuant to the provisions thereof, and before the making of the rate now appealed against, a vestry was duly elected for the parish.

The question for the opinion of the Court is, whether the rate is valid, having been made by the Governors and Directors under the provisions of *stat.* 26 *G.* 3. c. cxiv. and 5 *G.* 4. c. lxxiv.; or whether their power to make such rates was taken away by the Metropolis Local Management Acts, 18 & 19 *Vict.* c. 120. and 19 & 20 *Vict.* c. 112., or either of them.

It was agreed that if the rate had been made before the passing of the said Metropolis Local Management Acts it would have been a valid rate.

If the Court should be of opinion that it is a valid rate, judgment to be entered for the respondents; but, if the Court shall be of opinion that the said rate is invalid, judgment to be entered for the appellant.

B. C. Robinson, for the respondents. The rate is good. The Governors and Directors, by whom it was

1861.
 The QUEEN
 v.
 RENDLE.

made, were appointed by the select vestry chosen under the local Acts. That is a vestry of which the powers are not transferred, as the appellants will contend they are, to the new vestry appointed under The Metropolis Local Management Act, 1855. (The Court then called on the other side.)

Knapp, for the appellants. The rate is bad, having been made by a body which has now no jurisdiction. Sect. 8 of stat. 18 & 19 *Vict.* c. 120. enacts that the new vestry chosen as provided by the Act "shall forthwith be deemed to constitute the vestry of such parish, and shall supersede any existing vestry therein, and exercise the powers and privileges held by such existing vestry," save as provided by the Act. Such new vestry therefore ought to have appointed the Governors and Directors. In *Vaughan v. Imray* (a) the effect of stat. 18 & 19 *Vict.* c. 120., in transferring to the new vestry the powers and duties of old vestries under local Acts, was fully discussed. [*Crompton J.* There it was held that the old vestries had no longer power to make rates, their functions in that respect being transferred to the new vestry. The question here is, whether, although the power of rating be transferred to the new vestry, the select vestry still retain their power to appoint the Governors and Directors.] The old select vestry are, under the local Acts, to be elected annually by and out of the general vestry: it is clear, therefore, that the power in question is one of those "powers and privileges" which are now transferred to the new vestry by stat. 18 & 19 *Vict.* c. 120. s. 8. Even if, as may perhaps be contended on the other side, such powers and privileges do not include

(a) 1 E. & E. 633.

the power of making poor rates, that power is expressly transferred to the new vestry by sect. 3 of the amending Act, 19 & 20 *Vict. c. 112.*, which enacts that "all the duties, powers, and privileges (including such as relate to the affairs of the church, or the management or relief of the poor, or the administration of any money or other property applicable to the relief of the poor), which might have been performed or exercised by any open or elected or other vestry or any such meeting as aforesaid in any parish, under any local Act or otherwise, at the time of the passing of" stat. 18 & 19 *Vict. c. 120.*, "shall be deemed to have become transferred to and vested in the vestry constituted by such last mentioned Act." It is true that the proviso which follows provides "that all duties and powers relating to the affairs of the church, or the management or relief of the poor, or the administration of any money or other property applicable to the relief of the poor, which at the time of the passing of the said Act were vested in or might be exercised by any guardians, governors, trustees, or commissioners, or any body other than any open or elected or other vestry," &c., "shall continue vested in and be exercised by such guardians, governors, trustees, or commissioners" &c. But the powers in question were exercised by the vestry, and not by any other body; and are therefore not within the proviso. [*Crompton J.* That seems to be so. The argument, therefore, for the appellants is that, if this power to appoint Governors and Directors is a matter relating to the management or relief of the poor, or the administration of money applicable to such relief, it is transferred to the new vestry, under sect. 3 of the amending Act: and that, if it be not such a matter, it is trans-

1861.

The QUEEN
v.
RENDLE.

1861.

The QUEEN
v.
RENDELE.

ferred from the old vestry to the new, under sects. 8, 90, of the first Act.] That is the dilemma in which the respondents are placed.

B. C. Robinson, in reply. The election of the Governors and Directors is a matter which falls within the proviso of sect. 3 of the amending Act. [*Crompton J.* How can you shew that the power of electing them was ever vested in "any guardians, governors" &c., "or any body other than any open or elected or other vestry"?] It is clear that the power to make rates, which was a power "relating to the management or relief of the poor," was vested by the local Acts (which are still unrepealed), in the Governors, at the time of the passing of The Metropolis Local Management Act, 1855. And the proviso directs that in such cases the powers shall remain in and be exercised by "such" "Governors:" that is, by Governors elected in the same manner as under the local Acts. [*Blackburn J.* I think that construction cannot be supported. *Crompton J.* And, even if the power to make these rates were not a power relating to the management or relief of the poor, it would still have been transferred to the new vestry under the first Act. I think that the dilemma which has been already suggested is unanswerable.]

PER CURIAM. (CROMPTON, HILL and BLACKBURN Js.)

Judgment for the appellants.

1861.

The QUEEN *against* The Guardians of the Poor
of the CAMBRIDGE Union.

Wednesday,
April 24th.

*Lunatic
Asylums
Act, 16 & 17
Vict. c. 97.
Power of Ses-
sions to ad-
journ a part
heard appeal.*

1. The general power of a Court of Quarter Sessions to adjourn to the next Sessions the hearing of an appeal, where the particular Act giving the appeal does not limit the hearing and determination of it to one Sessions only, extends to cases where the hearing of the appeal has commenced and the evidence is partly before the Court. The Sessions have power, in such a case, to adjourn the further hearing to the next Sessions, for the purpose of additional evidence being procured: or for any cause which, in their discretion, may render the adjournment expedient.

2. Sessions may exercise this power of adjournment in appeals under The Lunatic Asylums Act, 16 & 17 Vict. c. 97.; the Act not limiting the hearing and determination to the Sessions for which the appeal is entered, or at which it is first gone into.

ON an appeal against an order of two justices of the borough of *Birmingham*, dated 14th *May*, 1860, under The Lunatic Asylums Act, 16 & 17 Vict. c. 97., adjudging the parish of *St. Edward, Cambridge*, to be the place of the last legal settlement of *William Ind Hailstone*, a pauper lunatic confined in the lunatic asylum of the borough of *Birmingham*, and ordering the payment by the guardians of the poor of the *Cambridge Union* of the sums incurred or to be incurred for the maintenance of the pauper, and which appeal came on to be heard at *Warwick*, at the *Midsummer Quarter Sessions* of the peace for the county of *Warwick*, held on 4th *July* 1860; the Court adjourned the further hearing of the appeal to the then next Quarter Sessions of the peace, subject to the opinion of the Court of Queen's Bench on the following case.

The settlement relied upon by the respondents at

1861.
The QUEEN
v.
CAMBRIDGE
Union.

the trial of the appeal was a settlement by apprenticeship: and, in support of this settlement, and in order to enable them to give secondary evidence of the indenture of apprenticeship of the pauper, the respondents called evidence to prove a proper search for the indenture, and the loss of the same. The Sessions, on hearing this evidence, and on the objection of the appellants, held that a sufficient search for the missing indenture had not been made by the respondents, and refused to admit secondary evidence of the same.

The respondents then applied to the Sessions to adjourn the further hearing of the appeal to the then next Quarter Sessions of the peace, in order to enable them to make further search for the said missing indenture.

On the part of the appellants it was objected that stat. 16 & 17 *Vict. c. 97.* limited the jurisdiction of the Sessions over the appeal to the particular Sessions at which the same was then being tried, and the Sessions had no power to adjourn the further hearing of the appeal, as contended for by the respondents; and that no subsequent Sessions had power over the appeal, and that the order of 14th *May* 1860 ought to be quashed, there being no evidence before the Sessions to support the same.

The Sessions held that they had jurisdiction to adjourn the further hearing of the appeal to the then next Quarter Sessions of the peace; and they made an order adjourning the same accordingly, on payment of the costs of the day by the respondents to the appellants, subject to the opinion of the Court of Queen's Bench on this point. And at the then next Quarter Sessions of the peace, held at *Warwick* on 16th *October* 1860,

the Court, on application of the respondents, and for the purposes of, and without prejudice to, this case, further adjourned the hearing of the appeal to the then next Quarter Sessions of the peace for the county.

1861.

THE QUEEN
V.
CAMBRIDGE
UNION.

If this Court should be of opinion that the decision of the Court of Quarter Sessions was incorrect on this point, and that they had no jurisdiction to adjourn the further hearing of the appeal, then the orders of Sessions adjourning the further hearing of the appeal, and the order of 14th May 1860, to be quashed.

Macaulay and E. Chandos Leigh, for the respondents. The adjournment was valid. Sessions have a general power to adjourn the hearing of an appeal. [*Crompton J.* Have they the power, in every case, to adjourn an appeal which has been entered upon and partly heard?] That point was not raised: the only question was, whether the particular statute, 16 & 17 *Vict. c. 97.*, takes away the power of adjournment in appeals against orders of settlement and maintenance under that Act. Sect. 108 enacts that the "Sessions, upon hearing the said appeal, shall have full power finally to determine the matter." But that is not inconsistent with their power to adjourn before finally determining. They would certainly have power to adjourn after hearing, and before giving judgment: and there is no reason why they should not adjourn at an earlier stage, in order to allow fresh evidence to be brought forward. [*Crompton J.* In the latter case, would the appeal have to be heard again *de novo*, or resumed at the point at which it was adjourned? I think it can hardly be said that the Sessions have not the power of adjournment con-

1861.
 The QUEEN
 v.
 CAMBRIDGE
 Union.

tended for; though it would not be a safe practice to exercise it. *Blackburn J.* Here the appellants did not consent to the adjournment.] Their consent was not essential. In *Rex v. The Justices of Wilts (a)*, where, by a local inclosure Act, it was enacted that, in case of an appeal to the Sessions, "the justices at the said General Quarter Sessions are" "required to hear and determine" such appeal, it was held that the Sessions had power to adjourn the hearing of the appeal, upon good cause appearing to them for such adjournment. Lord *Ellenborough C. J.* there says, "I hold, without any doubt, that the Court who are to try the appeal have an incidental authority to adjourn it, when once properly lodged, if it be necessary for the advancement or convenience of justice; and that the Sessions are to judge of the proper occasion of doing so." In *Rex v. Kimbolton (b)*, which was an appeal under stat. 4 & 5 *W. 4. c. 76.*, the Court held that the Sessions had an incidental power to adjourn, and *Coleridge J.* said: "Every Court of justice has an incidental power of adjourning, unless where they are bound by the positive words of a statute." *Regina v. Belton (c)* and *Bowman v. Blyth (d)* will probably be relied upon by the appellants. In *Regina v. Belton (c)* it was held that the Sessions could not adjourn an appeal, under the Victuallers' Licensing Act, 9 *G. 4. c. 61.*, against the refusal of a license, for the purpose of awarding costs there after a taxation in the interval. And in *Bowman v. Blyth (d)* it was held that the Sessions could not adjourn the consideration of a table of fees to be taken by the clerks of justices, made and submitted to the Sessions under stat. 26 *G. 2. c. 14.* But, in each of

(a) 13 *East*, 352.

(c) 11 *Q. B.* 379.

(b) 6 *A. & E.* 603.

(d) 7 *E. & B.* 26.

those cases, the Court, in giving judgment, distinctly stated that their decision was based upon the language of the particular statute creating the appeal, and was not to be considered as questioning the general power of Sessions to adjourn. [*Crompton J.* In *Regina v. Kendal* (a) I am reported to have said, "If the case had really been entered upon, it could not have been adjourned, any more than a cause at *Nisi Prius*, on the ground of the absence of a material witness." I ought rather to have said that it could not be adjourned except for strong and peculiar reasons.] Those reasons are for the Sessions; *Ex parte Beche* (b). In *Keen v. The Queen* (c) it was contended that the Sessions had no power to respite a judgment from one Sessions to another, without adjourning the Sessions, inasmuch as, otherwise, the Sessions which gave the judgment would not be, technically, the same Sessions as that before which the case was heard. But the Court held that that was not so, inasmuch as the Sessions were held under one continuing commission. Lord *Denman* C. J. said, "It is assumed that a subsequent Session is a different Court from a former Session. But it is clearly the same Court. The whole body of justices constitute the Court. Such a Court" "possesses, as incident to its jurisdiction, the power of adjournment."

1861.

THE QUEEN
V.
CAMBRIDGE
UNION.

Huddleston and *Isaac Spooner*, for the appellants. There is no authority for the position that the Sessions can adjourn the further hearing of an appeal, after it has been once commenced and partly heard. Such

(a) 1 E. & E. 492.

(b) 3 B. & Ad. 704.

(c) 10 Q. B. 928.

1861.

The QUEEN
v.
CAMBRIDGE
Union.

power can exist only by statute: and, not only is there no statute giving such power to adjourn, but, as regards this particular case, the statute under which the appeal was made distinctly excludes such power. [*Crompton J.* Would not an adjournment of this kind be rather in the nature of a respite under the old Acts?] The power to respite, in the same way, exists only by statute, 9 *G.* 1. c. 7. s. 8. And here the statute excludes such power. Here, moreover, the hearing of the appeal had already commenced. In *Bac. Abr.*, vol. 2, p. 477 (7th ed.), it is laid down that, "when the justices are once legally convened, they cannot adjourn any matter depending before them, without expressly adjourning the Sessions also;" citing *Rex v. Reading* (a). [*Blackburn J.* That case seems an authority that the Court *has* the power to adjourn.] It does not distinctly appear that the hearing of the appeal had commenced. The observations of the Court in *Rex v. The Justices of Wilts* (b) and *Rex v. Kimbolton* (c), cited for the respondents, and the decision in *Regina v. The Justices of Warwickshire* (d), apply only to the case of an appeal duly lodged, but not yet entered upon. In the same way, a Court sitting at *Nisi Prius* could not, before the passing of The Common Law Procedure Act, 1854, 17 & 18 *Vict.* c. 125. s. 19., have adjourned a part heard cause: its only power of adjournment was under stat. 1 *Ed.* 6. c. 7., referred to in *Hale's History of the Pleas of the Crown*, vol. II. c. 4. [*Crompton J.* That was a power only to adjourn the writ of assize, a writ of a very peculiar nature. Before the Common Law Procedure Act, 1854, a Judge at *Nisi Prius* could

(a) *Ca. temp. Hard.* 79.(b) 13 *East*, 352.(c) 6 *A. & E.* 603.(d) 28 *L. J. M. C.* 249.

not have adjourned a part heard cause, because, in fact, that would be, not an adjournment, but a new process under a new commission; and there would be a new Judge and a new jury.] Here, also, as the Sessions are Judges both of fact and law, there might also be a new Judge and a new jury. Further, as has already been said, the Act under which this appeal is made excludes all power to adjourn under these circumstances. Sect. 108 provides that "such Sessions, upon hearing the said appeal, shall have full power finally to determine the matter." "Such Sessions" must refer to the Sessions mentioned in the earlier part of the section, that is, "the next General Quarter Sessions." And the words "upon hearing the said appeal" clearly point to a decision and a hearing at one and the same Sessions. Moreover, sect. 128, which expressly gives the Sessions power to adjourn an appeal against orders "other than orders adjudicating as to the settlement of any lunatic pauper," or his maintenance, deprives the Sessions, by implication, of power to adjourn appeals against such last mentioned orders. *Regina v. Belton* (a) and *Bowman v. Blyth* (b) are authorities in favour of the appellants. The language of the particular statute in each case was very similar to that of stat. 16 & 17 Vict. c. 97. [*Crompton J.* In *Rex v. Hedingham Sible* (c) it was held that, if the Sessions refer a case conditionally to the next Judge of assize, they must continue the appeal by adjournment to a future Sessions.] There, also, the report does not state clearly at what stage the appeal was adjourned, or whether it was considered, by the Court, that any adjournment would have been good if

1861.

THE QUEEN
v.
CAMBRIDGE
Union.

(a) 11 Q. B. 379.

(b) 7 E. & B. 26.

(c) *Burr. Sett. Ca.* 112.

1861.
 The QUEEN
 v.
 CAMBRIDGE
 Union.

the hearing had once commenced. And here the general power to adjourn, even if it exist under those circumstances, is taken away by the particular statute.

CROMPTON J. (*a*). I am of opinion, upon the whole, that the Sessions had jurisdiction to adjourn the hearing of this appeal. The jurisdiction is one which should be exercised with very great caution, and only when the interests of justice positively require it; but I think the jurisdiction exists. In *Regina v. Kendal* (*b*) I seem to have somewhat hastily assumed that, if the hearing of the appeal had once been entered upon, the case could not be adjourned. I ought rather to have said that it ought not to be adjourned, except under very peculiar circumstances. Then, the Sessions having this general power of adjournment, I do not see anything in the present case to distinguish it from the ordinary class of appeals at Sessions, in which it has been held, as in *Regina v. The Justices of Warwickshire* (*c*), that that power may be exercised. *Regina v. Belton* (*d*) and *Bowman v. Blyth* (*e*) are distinguishable; because the words of the particular statute, in each of those cases, clearly limited the power of hearing and adjudication to the one particular Sessions at which the matter was to come on for hearing. It is contended by the appellants that a similar limit is imposed by the statute in this case: but I see nothing in its language to support such a contention. As regards the mode of adjournment, I should say that the whole appeal ought to be reheard at the Session to which it is adjourned. The authorities, how-

(*a*) *Cockburn C. J. was absent.*

(*b*) 1 *E. & E.* 492.

(*d*) 11 *Q. B.* 379.

(*c*) 28 *L. J. M. C.* 249.

(*e*) 7 *E. & B.* 26.

ever, are strong to shew that that is not a necessary condition of the adjournment: but that, in some cases, even when the hearing of the appeal has commenced, the final determination of it may be adjourned, by entering continuances to the next Sessions. It has been held that this may be done for the purpose of obtaining the opinion of a Judge of assize. Why should it not be done in other cases, when the interests of justice make it advisable? In *Rex v. Hedingham Sible* (a), where an order, founded upon the decision of a Judge of assize to whom the case was referred, was held bad, because there had been no adjournment by continuance, it does not appear, from the report, that any opinion was expressed against the validity of an adjournment, by continuance, of an appeal which had been only partly heard; and the expression that "the Sessions could not take the matter up again" looks as if the case had been partly entered upon before it was referred. In *Regina v. Reading* (b), cited in *Bacon's Abridgement*, it seems, especially from the judgment of Lord *Hardwicke*, as if the case had been half heard before it was adjourned for the opinion of the judges. The present case has been very ingeniously argued, and I have not been without doubt during the discussion: but, upon the whole, I am of opinion that there is nothing to shew that the Sessions have not jurisdiction, either to respite an appeal of this nature, or, if it has been partly heard, to enter continuances and adjourn it to the next Sessions. I think that such power is included in their general jurisdiction; but it is a power which should be exercised most sparingly and cautiously. My brother *Hill* (c) desires me to say

1861.

The QUEEN
v.
CAMBRIDGE
Union.

(a) *Burr. Sett. Ca.* 112.(b) *Ca. temp. Hard.* 79.(c) *Hill J.* had left the Court during the argument.

1861.

The QUEEN
v.
CAMBRIDGE
Union.

that, as far as he is enabled to judge from what he heard of the argument, his opinion agrees with mine.

BLACKBURN J. I am of the same opinion. As to the effect of the particular statute, I think it leaves the Sessions the same power of adjournment as that which they have generally in cases of appeal, and which is laid down by Lord *Ellenborough* C. J. in *Rex v. The Justices of Wilts (a)*. It is possible that he did not, at the time, contemplate the case of a part heard appeal: and the question is, does the fact of the appeal having been partly heard create an exception to the general rule? There is no doubt that considerable inconvenience may arise from an adjournment in such a case; and, at all events, the Sessions are bound to exercise great caution in so adjourning: but I cannot find anything to shew that this power of adjournment is limited to cases where the hearing of the appeal has not commenced. Whether the circumstances of this particular case warranted the Sessions in adjourning I do not take upon myself to say, as we have not sufficient materials for a decision before us. But it is clear that there may be instances in which an adjournment under such circumstances would be expedient: and both *Rex v. Hedingham Sible (b)* and *Rex v. Reading (c)* seem to have been cases in which the justices adjourned after having partially heard the evidence. Lord *Hardwicke* says, in the latter case, "Where an appeal is lodged in the Sessions, it is necessary that they make a direct and final judgment, and they cannot refer it to the Judges of assize for their judgment; *Salk.* 480;" "but then it cannot be doubted but

(a) 13 *East*, 353.

(b) *Burr. Sett. Ca.* 112.

(c) *Ca. temp. Hard.* 79.

that they may continue over the determination on the appeal by a proper adjournment, either to take the advice of the judges, or for any other reason." If I understand this passage rightly, Lord *Hardwicke* means that the justices have power to adjourn the hearing, even if commenced, for any reason which may seem good to them. I think, therefore, that the respondents are entitled to our judgment: but I hope it will be understood that the great inconvenience which would attend, in many cases, the exercise of the power of adjournment, should cause it to be exercised sparingly.

Judgment for the respondents.

1861.

The QUEEN
v.
CAMBRIDGE
Union.

The QUEEN *against* The Governor and Committee of The LICENSED VICTUALLERS' SOCIETY.

Wednesday,
April 24th.

The Society of Licensed Victuallers, founded for the purpose of relieving distressed members from its funds, was incorporated by Royal charter. The Society maintained a school for the education, free of charge, of the children of decayed or deceased licensed victuallers; and possessed a school house and other premises, used for that purpose. The charter provided that the management of the Society should be entrusted to a Governor and Committee: and that the members of the Society should meet quarterly, and should have power, at such meetings, to make by-laws. One of these by-laws, so made, provided that these quarterly meetings should be held in the premises of the Society's school, or at such other place as the Governor and Committee might appoint. These meetings were accordingly held on the premises.

*Rateability of
School house.
Beneficial
occupation.
Charitable
purposes.*

On appeal by the Society against a poor rate, a general rate for defraying the expences of The Metropolis Local Management Act, and a sewers rate for defraying the expences of the main drainage, assessed upon them in respect of the premises in question:

Held, that the Society had a beneficial occupation of the premises, and were rateable in respect of them.

THIS was a case stated under stat. 12 & 13 Vict. c. 45.
s. 11.: and was substantially as follows.

The Governor and Committee of *The Licensed Victuallers' Society* had been assessed to the rate for the relief

1861.
 The QUEEN
 v.
 LICENSED
 VICTUALLERS'
 Society.

of the poor for the parish of *Saint Mary, Lambeth*, made on 17th *January*, 1860, in respect of the premises hereinafter mentioned, and described in the rate as a school room, house, ground and buildings, situate in *Kennington Lane*, in the said parish, and known as "*The Licensed Victuallers' School*."

The Governor and Committee had also been assessed to the general rate for defraying expenses of highways and other expenses of executing The Metropolis Local Management Act (excepting lighting and sewers), made on the same day in respect of the same premises.

The Governor and Committee had also been assessed to the sewers rate, made on 1st *November*, 1859, for defraying the expences of the main drainage, at 8d. in the pound on houses and buildings, and three farthings in the pound on land, in respect of the same premises.

The Society of Licensed Victuallers is incorporated by Royal Charter, dated 3d *May*, 1836, by the name and style of "*The Society of Licensed Victuallers*." The charter (a copy of which accompanied and formed part of the case) recited, amongst other things, that "*The Friendly Society of Licensed Victuallers*" had been formed in 1793, and that, for the purpose of forming a permanent fund for the relief of the sick, infirm and distressed brethren, a capital was subscribed, and the publication of a daily morning newspaper commenced, on 8th *February* 1794, called *The Morning Advertiser*, the profits arising from which had been and still were applied to the purposes of the said Society; and that a school was established in *Kennington Lane*, in the county of *Surrey*, for educating the children of distressed, decayed and deceased licensed victuallers. The charter, after incorporating the said Society by the name of "*The Society of Licensed*

Victuallers," declared that the male members should meet not less than four times a year for the purposes of the Society, and at such meetings might make by-laws for carrying out the objects of the Society. The charter also provided that the executive business of the Society should be vested in "the Committee of Management," consisting of twenty three persons elected by and among the members, one of which twenty three was to be called "the Governor" of the Society.

1861.

The QUEEN
V.
LICENSED
VICTUALLERS'
Society.

The newspaper mentioned in the charter has continued to be published ever since the date of the charter.

By-laws have been made from time to time in the manner provided in the charter. By one of the by-laws it was provided that, out of the profits of the newspaper, certain annual amounts should be appropriated to various charitable "funds" of the Society: and that any balance remaining should be divided among the members entitled to participate. By another by-law it was provided that the four quarterly meetings of the Society should be held "in the premises of the said Society's school, or at such other place as the said Governor and Committee of management" "may appoint."

The premises rated are the freehold property of *The Society of Licensed Victuallers*, and are used for the purposes of a school for the benefit of the children of licensed victuallers, and for the other purposes mentioned in the by-laws in respect of the user of the school as hereinafter mentioned. The children are maintained, clothed and educated therein free of charge.

The school house contains suitable apartments for the masters and mistresses, children and servants of the institution, and also a large hall in which the quarterly

1861.
 The QUEEN
 v.
 LICENSED
 VICTUALLERS'
 Society.

and other meetings of the Society, upon the general business of the Society, are held.

The newspaper in the charter and by-laws mentioned, and the school, are managed by the Governor, Committee, trustees, auditors and other officers of the said Society. The profits arising from the newspaper are applied as provided for in the by-laws.

The Governor and Committee contended that they had no beneficial occupation of the said school house, and were not liable to be rated to the poor rate, general rate and sewers rate, or any or either of those rates, in respect of the school house.

If the Court should be of opinion that the Governor and Committee were liable to be rated to the poor rate, general rate and sewers rate, the rates were to be confirmed. If the Court should be of opinion that the Governor and Committee were not liable to be rated to any or either of the rates, the rates were to be amended by striking out the names of the Governor and Committee therefrom. If the Court should be of opinion that the Governor and Committee were liable to one or more of the rates, and not liable to the other or others of the rates, then such one or more of the rates were to be confirmed, and such other or others of the rates to be amended by striking out the names of the Governor and Committee therefrom.

Lush, for the respondents. The Society is rateable in respect of its beneficial occupation of these premises. [*Crompton J.* Perhaps the best course will be for the other side to state the grounds upon which they contend that the appellants are not rateable.]

Huddleston, for the appellants. The Society has no beneficial occupation. The objects of the school are purely charitable : there are no payments by the pupils, as in *Regina v. Sterry* (a) and *Regina v. Temple* (b) ; nor does the Society derive any emolument whatever from the school. As to the newspaper, the Society may, in one sense, be said to be the proprietors of it, and to derive emolument from it. But they appropriate a certain portion of the profits to charitable purposes : and have not, therefore, any more than a private individual who devotes part of his income to charitable purposes, any beneficial occupation of the buildings used solely for such purposes. It is true that the quarterly meetings of the Society are held on the premises : but, by the by-laws, they have power to hold them at such other place as the Governor and Committee of management may appoint. And, further, the use of the premises for the business of the Society is not such a beneficial occupation as creates rateability. Buildings used for charitable purposes are on the same footing, in this respect, as buildings used for public purposes : and are evidently so treated in *Nolan's Poor Law*, vol. 1., where it is said, p. 184, " If there is no beneficial occupation for private emolument the property is not liable to assessment ; but when such an occupier does exist, he is rateable, although the ultimate object of his occupation be to promote a charitable institution, or advance the public good." In *Rex v. Waldo* (c) it was held that an almshouse, wholly occupied by objects of charity or their attendants, and of which no profit was made, had no rateable occupier. Lord *Mansfield*, in giving judgment,

1861.

The QUEEN
v.
LICENSED
VICTUALLERS'
Society.

(a) 12 A. & E. 84.

(b) 2 E. & B. 160.

(c) *Cald.* 358.

1861.
 The QUEEN
 v.
 LICENSED
 VICTUALLERS'
 Society.

says, "It is sufficient that" "the profit is here in fact applied to public and charitable uses." *Rex v. Waldo* (a) was recognised as an authority by the Court in *Rex v. Agar* (b), *Regina v. Wilson* (c) and *Regina v. Temple* (d). In *Regina v. Baptist Missionary Society* (e), which is probably relied on by the respondents, the Society not only used the rooms for their own meeting, but let them to other Societies for similar purposes; and were therefore held rateable. [Hill J. The Court, in giving judgment, say, "We think it right to add that we find no authority or principle for holding that a number of individuals, occupying premises merely for the purpose of diffusing religious instruction, would be, on that account, exempt from rateability in respect of them to the relief of the poor." That is strongly against you.] In the present case there is clearly no beneficial occupation. [Hill J. I do not agree that there is no distinction between buildings used for charitable, and buildings used for public, purposes. In the former case, there is an actual occupier: in the latter there is not. Crompton J. In *Regina v. Baptist Missionary Society* (e) Erle J. takes that distinction, in the course of the argument; and Coleridge J. says: "*Regina v. Wilson* (f) and *Rex v. Waldo* (a), if to be supported at all, must be supported on the ground that the person rated did not occupy the premises."]

PER CURIAM. (CROMPTON, HILL and BLACKBURN Js.)

Judgment for the respondents.

(a) *Cald.* 358.

(c) 12 *A. & E.* 94.

(e) 10 *Q. B.* 884.

(b) 14 *East*, 258.

(d) 2 *E. & B.* 180.

(f) 2 *A. & E.* 84.

1861.

The QUEEN *against* PICKFORD.*Wednesday,
April 24th.*

The mother of a bastard child applied to a justice, within twelve months after the child's birth, for a summons against *P.*, the alleged father. The summons was issued by the justice, but could not be served, *P.* having absented himself. On *P.*'s return, which was more than twelve months after the child's birth, and before which time the justice who had issued the first summons had died, the mother obtained from another justice a second summons against *P.*; and, upon its coming on for hearing, the justices in petty session made an order adjudging *P.* to be the putative father, and ordering him to pay a certain sum by way of maintenance.

*Stat. 7 & 8 Vict.
c. 101.**Bastardy
order, on
second sum-
mons issued
by a second
justice.**Jurisdiction.*

Held, that the order was bad, inasmuch as, by stat. 7 & 8 *Vict.* c. 101. s. 2, the jurisdiction to make the order is limited to the justice before whom the first application is made; and that the second summons, not being issued by the same justice, could not be considered as part of the original process upon the first application.

KENEALY, in last *Michaelmas* Term, obtained a rule to shew cause why an order, under the hands and seals of three justices for the county of *Chester*, adjudging the defendant to be the putative father of a male bastard child, born of the body of *Jane Mason*, and ordering him to pay certain sums of money in respect of the said child, should not be quashed.

The order was as follows.

“Order in bastardy, on application after birth.

“*Cheshire*, to wit.] At a petty session of Her Majesty's justices of the peace of the county of *Chester*, acting in and for the petty sessional division of *Prestbury*, in the hundred of *Macclesfield*, in the said county of *Chester*, holden 21st *August*, 1860, before us, *Charles Richard Banistre Legh*, *John Dixon* and *John Upton Gaskell*, Esquires, three of Her Majesty's justices of the peace in and for the same county: Whereas *Jane Mason*, of the township of *Bollington*, in the said county, single

1861.
The QUEEN
v.
PICKFORD.

woman, did, on 15th *June*, 1858, at *Macclesfield*, in the said county, make information and complaint to *Thomas Swanwicke*, Esq., one of Her Majesty's justices of the peace in and for the said county, and acting in and for the said division, that she was a single woman, and then residing within the township of *Bollington*, in the division and county aforesaid, and that on 25th *March* 1858 she was delivered of a male bastard child, which was then living; and she charged *William Pickford*, of the township of *Bollington*, in the said county, labourer, with being the father of such child, and she then and there made application to the said justice for a summons to the said *William Pickford* to appear at a petty sessions of the peace in and for the said division, to answer her complaint in the premises; and thereupon the said justice issued his summons accordingly to the said *William Pickford* to appear and answer the said complaint at the said petty sessions to be holden on a day therein mentioned, to wit on 29th *June* 1858: And whereas the said *William Pickford*, at the time of such application being made, had absconded from *Bollington* aforesaid, and his abode was then and has ever since, until the month of *July* last, continued unknown to the said *Jane Mason*, and the said summons could not be served on the said *William Pickford*: And whereas the said *Thomas Swanwicke* died, and, on 3d *August* 1859, and afterwards, to wit on 14th *July* last, the said *Jane Mason* made application to *Thomas Wardle* Esquire, one of Her Majesty's justices of the peace in and for the said county, and acting in and for the said division, for a summons to the said *William Pickford* to appear at a petty session of the peace in and for the said division, to answer her complaint in the premises; and thereupon

the said last named justice issued his summons accordingly to the said *William Pickford* to appear and answer the said complaint at the said petty session holden this day: And whereas the said *William Pickford* hath been duly served with the said last mentioned summons six days at least before this day, but he doth not appear thereto, and the said *Jane Mason* is now present for the purpose of obtaining from us, the said justices in petty sessions assembled, an order upon the said *William Pickford* in the premises.

"Now, therefore, it being proved to us upon oath that the said *Jane Mason* is a single woman, and was, at the time of her application for the said first and last mentioned summonses as aforesaid, and still is, residing within the said township of *Bollington*, in the division and county aforesaid; and that, on the said 25th *March* 1858, she was delivered of the said male child, and that such child was born a bastard, and is still living: and we, having also heard the evidence upon oath of the said *Jane Mason*, the mother, and other evidence upon oath produced by her, and the evidence of the said *Jane Mason* the mother being corroborated in some material particulars by other testimony to our satisfaction, and we also having had the other facts and circumstances herein contained proved upon oath to us, do hereby adjudge the said *William Pickford* to be the putative father of the said bastard child; and, having regard to all the circumstances of the case, we do hereby order that the said *William Pickford* shall pay unto the said *Jane Mason*, so long as she shall live and be of sound mind, and shall not be in any gaol, prison, or under sentence of transportation; and after her death, or whilst she shall be of unsound mind, or confined in any

1861.

The QUEEN
V.
PICKFORD.

1861. gaol or prison, or under sentence of transportation,
 The QUEEN then unto such person as two justices may appoint to
 v. have the custody of the said child, pursuant to the
 PICKFORD. statute in such case made and provided, the sum of
 two shillings weekly and every week from the time of
 making the application first aforesaid until the said
 child shall attain the age of thirteen years, or shall
 die, or the said mother shall marry. And we do hereby
 further order the said *William Pickford* to pay to the
 said *Jane Mason* the sum of nine shillings and six pence,
 being the costs incurred in obtaining this order; and
 the sum of ten shillings for the midwife. Given under
 our hands and seals'' &c.

T. W. Saunders now shewed cause. The order is
 valid. Stat. 7 & 8 Vict. c. 101. s. 2. enacts that the
 mother of the child shall make application for the sum-
 mons either before, or within twelve months after, the
 birth of the child. Here the mother did apply within
 twelve months, and obtained a summons; but the sum-
 mons could not be served, owing, not to any fault of
 the applicant, but to the absence of the alleged father.
 She took out a fresh summons upon his return; and,
 although the second application was more than twelve
 months after the birth of the child, the order made
 upon such second summons is good, the whole pro-
 ceeding being founded upon the original application;
Potts v. Cumbridge (a). [*Crompton J.* I have some
 difficulty in seeing how, under the present circum-
 stances, the second summons can be considered part of
 the original process upon the first application. In *Potts*
v. Cumbridge (a) the second summons was issued by the

(a) 8 E. & B. 847.

justice to whom the first application was made. Here 1861.
 the justice to whom the first application was made is The QUEEN
 dead; and the second summons is issued by another. V.
 PICKFORD.
 Sect. 2 of stat. 7 & 8 *Vict. c. 101.* gives jurisdiction
 only to "such justice;" that is, to the justice to whom
 the original application is made.] The provision is
 directory, not compulsory. [*Hill J.* It seems to me
 to limit the jurisdiction to the justice before whom the
 first application is made.] The defendant ought not
 to be allowed to avail himself of a technical difficulty
 created by his own act. [*Crompton J.* That cannot
 affect the question of jurisdiction.] The second order
 was intended to be, and is, as far as it can be, a con-
 tinuation of the original process.

Kenealy, contra, was not called upon.

PER CURIAM. (CROMPTON, HILL and BLACKBURN Js.)

Order quashed, without costs.

In the matter of the Lords Commissioners of the
 TREASURY, ex parte WALMSLEY.

Thursday,
 April 25th.

*Expences of
 County Courts.
 Lords Commis-
 sioners of the
 Treasury.
 Mandamus.*

A mandamus will not lie to the Lords Commissioners of the Treasury to compel them to pay a debt incurred by a County Court; and this even although Parliament has, upon an estimate made by the Commissioners of the Treasury, voted a sum for the salaries and expences of the County Courts for the year.

HONYMAN moved for a rule calling on the Lords
 Commissioners of Her Majesty's Treasury to shew
 cause why a mandamus should not issue, commanding

1861.

Ex parte
WALMSLEY.

them to pay 547l. 9s. 6d., the balance of account from *Thomas Walmsley, of Liverpool*, printer and stationer, for books, printing and stationery supplied to the *Liverpool* County Court during the years 1858 and 1859. The stat. 19 & 20 *Vict. c. 108. s. 85.* enacts: "The expence of building, purchasing, or providing any messuages and lands for the purposes of the County Courts, and of repairing, furnishing, cleaning, lighting, and warming the Court Houses and offices, and of payment of the salaries of the necessary servants for taking charge of such court-houses and offices, and of supplying the courts and offices with law and office books and stationery, and of postage stamps, and the disbursements of the high bailiffs in conveying to prison persons committed by the County Courts, and all other expences incident to the holding of the said Courts, shall be paid by the Commissioners of Her Majesty's Treasury out of any moneys to be from time to time provided by Parliament for such purposes." By an appropriation Act, 21 & 22 *Vict. c. 107. s. 20.*, dated 2d *August*, 1858, 157,050*l.* was voted to defray the salaries and expences of the county courts to the 31st *March*, 1859; and by another appropriation Act, 22 & 23 *Vict. c. 55. s. 17.*, dated 13th *August*, 1859, 126,150*l.* was voted for the like purposes to 31st *March*, 1860. These sums were voted in accordance with estimates drawn up by Her Majesty's Treasury.—If the Court refuses this application Mr. *Walmsley* is without remedy, for he cannot sue the treasurer of the county court. (He cited *Rex v. The Lords Commissioners of the Treasury (a).*)

COCKBURN C. J. The expression in stat. 19 & 20 *Vict.*

(a) 4 *A. & E.* 286.

c. 108. s. 85., that these expences are to be paid by the Commissioners of Her Majesty's Treasury, surely means that they are to be paid by them through the treasurers of the county courts. It cannot mean that the Lords of the Treasury are to account with every creditor of every county court, were it even for a half dozen pounds of tallow candles used in the court.

1861.

Ex parte
WALMSLEY.

CROMPTON J. In *Rex v. The Lords Commissioners of the Treasury* (a) the applicant was a specific party whom the Lords of the Treasury had promised to pay; but the present application assumes a ludicrous aspect. Is it common sense to suppose that every old woman who sweeps out the building where a county court is held has a right to proceed against the Lords of the Treasury for payment of her services?

(HILL J. had left the Court.)

BLACKBURN J. The applicant here must go the length of contending that every county court can pledge the credit of the Lords of the Treasury to every tradesman. Parliament vote for the county courts a lump sum which they think reasonable, but they do not vote the payment of each particular debt. A tradesman should not part with his goods for the use of a county court unless he is prepared to trust to its treasurer for payment.

(a) 4 A. & E. 286.

1861.

Saturday,
April 27th.

*Towns Im-
provement
Clauses Act,
10 & 11 Vict.
c. 34.
Birmingham
Improvement
Act, 14 & 15
Vict. c. xciii.
Rating of
reservoirs,
pipes and
mains.*

The QUEEN against The Company of Proprietors of the BIRMINGHAM Waterworks.

The Birmingham Waterworks Company, incorporated by stat. 7 G. 4. c. cix., were empowered by that statute to construct waterworks, and to supply, by means of aqueducts, pipes, mains and reservoirs, the borough of *Birmingham &c.* with water. The Company executed the necessary works, and made a large reservoir without, and a small reservoir within, the borough; the latter of which was supplied with water forced from the former through mains and pipes under the ground, thereby supplying a small portion of the borough with water. By 18 Vict. c. xxxiv., embodying the Waterworks Clauses Act, 10 & 11 Vict. c. 17., the former Act was repealed, and the Company empowered to form other reservoirs, obtain water from fresh sources, and erect additional works. The Company proceeded to execute new works; and constructed new reservoirs outside the borough, and laid down new mains and pipes for carrying the water from them into the old one without the borough, and thence into and through the borough: the streams supplying the reservoirs being open streams and brook courses running over the surface of the ground; the reservoirs both within and without the borough being wholly uncovered. By *The Birmingham Improvement Act*, 14 & 15 Vict. c. xciii., with which a considerable part of the *Towns Improvement Clauses Act*, 10 & 11 Vict. c. 34., is incorporated, the town council are authorized to make and levy a rate, called "*The Borough Improvement Rate*," upon "every person who occupies any house, shop, warehouse, counting house, coach house, stable, cellar, vault, building, workshop, manufactory, garden, land or tenement whatsoever except as hereinafter excepted, within the limits of that Act, according to the full net annual value thereof respectively." And by clause 129 it is provided that "the occupiers of any land covered with water or used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be rated in respect of the same to the rates authorized to be levied by this Act at one fourth part only of the net annual value." Held,

1. That the reservoir within the borough was rateable to the borough rate at only one fourth part of its net annual value.

2. That the pipes and mains of the Company within the borough were rateable to the borough rate to the full extent, and not merely to one fourth part of their net annual value as "land covered with water."

THE town council of the borough of *Birmingham* made the following rate or assessment on *The Company of Proprietors of the Birmingham Waterworks*.

"*St. Paul's Ward*."

"Public Companies. Borough Improvement
Rate, 1860."

Name of Occupier.	Name of Owner.	Description rated.	Gross estimated rate.	Rateable value.	Rate at 2s. in the pound.
<i>The Birmingham Waterworks Company.</i>	<i>The Birmingham Waterworks Company.</i>	Houses, offices, workshops, mains, reservoir, land and premises in various Wards within the borough.	£1739	£3941	£394 : 2 : 0
<i>Henry Reft.</i>	"	House, yard and premises.	£48	£40	£4 : 0 : 0 "

1861.

The QUEEN
v.
BIRMINGHAM
Waterworks
Company.

Against this rate the proprietors of the Waterworks appealed, and the appeal was heard before the Recorder at *Birmingham* on the 9th *April*, 1860, when the rate was confirmed by consent, subject to a case stating the following facts.

The Company of Proprietors of the Birmingham Waterworks was incorporated by stat. 7 G. 4. c. cix. (a). The objects of the Company were to construct waterworks, and to supply, by means of aqueducts, pipes, mains and reservoirs, the town of *Birmingham* and the several parishes and places therein named with water. The Company executed the necessary works, and supplied the different places with water taken from the river *Tame*, and made, at *Aston*, a large reservoir, covering about 18 acres of land, for that purpose. That reservoir and the engine house, pumping engine and works of the Company are out of the borough of *Birmingham*. They likewise constructed another small reservoir of stone at *Edgbaston*, within the

(a) Entitled "An Act for supplying with water the town and neighbourhood of *Birmingham*, in the county of *Warwick*."

1861.
 The QUEEN
 v.
 BIRMINGHAM
 Waterworks
 Company.

borough of *Birmingham*, of about 2 acres ; which reservoir is supplied with water forced from the large reservoir through mains and pipes under the ground, and supplies a small portion of the borough (about one tenth) with water by gravitation.

The Company obtained another Act, 17 *Vict. c. xxxvii.*, to enable them to raise further capital and borrow an additional sum of money.

Subsequently a third Act, 18 *Vict. c. xxxiv.*, was obtained, by which the two former Acts were repealed, and in which was embodied The Waterworks Clauses Act, 10 & 11 *Vict. c. 17*. The Company were empowered by this Act to form other reservoirs, and to obtain water from other sources than the river *Tame* before named, and to erect additional works.

Immediately after the passing of the last mentioned Act the Company proceeded to execute the new works ; and constructed new reservoirs outside of the borough of *Birmingham*, and laid down new mains and pipes for the purpose of carrying the water from the new reservoirs into the old one at *Aston*, without the borough, and thence into and through the borough. The various streams supplying the reservoirs are open streams and brook courses, and run over the surface of the ground. The reservoirs both within and without the borough are wholly uncovered.

By The *Birmingham Improvement Act*, 1851, 14 & 15 *Vict. c. xciii.*, in which stat. 10 & 11 *Vict. c. 34*. (The Towns Improvement Clauses Act), so far as relates to sects. 167 to 184, both inclusive, is incorporated, the town council are authorized, by clause 128, to make and levy a rate, to be called the Borough Improvement Rate,

upon every person who occupies any house, shop, warehouse, counting house, coach house, stable, cellar, vault, building, workshop, manufactory, garden, land or tenement whatsoever, except as hereinafter excepted, within the limits of this Act, according to the full net annual value thereof respectively. And by clause 129 it is provided that the occupiers of any land covered with water, or used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be rated in respect of the same to the rates authorized to be levied by this Act at one fourth part only of the net annual value. And by clause 131 certain additional clauses of The Towns Improvement Clauses Act (10 & 11 Vict. c. 34.), viz. 156 and 163 to 166, both inclusive, are incorporated.

The borough improvement rate which was the subject of this appeal was made in pursuance of and subject to the provisions of the said Act, and for all the purposes to which it is by such Act applicable, and was at the rate of 2s. in the pound.

It was admitted that *The Birmingham Waterworks Company* were rated to the full extent, as houses &c.; and not at one fourth part of the net annual value of the reservoir, pipes, mains and other works within the borough.

At the hearing of the appeal the appellants contended:

Firstly. That, so far as related to the expences of sewers, the pipes, mains, reservoirs and other works of the Company, or some of them, were not liable to be rated, except so far as they might receive benefit from the construction and existence of such sewers.

1861.

The QUEEN
v.
BIRMINGHAM
Waterworks
Company.

1861.

The QUEEN
v.
BIRMINGHAM
Waterworks
Company.

Secondly. That, by the operation of the 129th section, the reservoir within the borough ought only to be rated at one fourth part of its net annual value.

Thirdly. That, according to the true construction of the 129th section, the pipes and mains of the Company within the borough ought to be rated as land covered with water.

The question turned on the construction of certain clauses of The *Birmingham Improvement Act*, 14 & 15 *Vict. c. xciii.*, and The *Towns Improvement Clauses Act*, 10 & 11 *Vict. c. 34.* which is incorporated with it.

Stat. 14 & 15 *Vict. c. xciii. s. 109.* enables the town council to provide for the borough a sufficient supply of water, and for that purpose to purchase the works of *The Birmingham Waterworks Company.*

By sect. 114, "the council may cause all existing public cisterns, pumps, wells, reservoirs, conduits, aqueducts, and works used for the gratuitous supply of water to the inhabitants of the borough to be continued, maintained, and plentifully supplied with water, or they may substitute, continue, maintain, and plentifully supply with water other such works equally convenient; and the council may, if they think fit, construct any number of new cisterns, pumps, wells, conduits, and works for the gratuitous supply of any public baths or wash-houses established otherwise than for private profit."

By sect. 127, "except where it is otherwise provided by this Act, all the other expences of carrying this Act into execution, including the sums required for paying all principal and interest moneys which may be borrowed by the council under the authority of this Act, otherwise than on the security of the 'Street Improvement Rate,' shall be defrayed by a rate to be called

the 'Borough Improvement Rate,' which the council is hereby authorized and empowered to levy upon the occupiers or owners of all buildings and lands within the borough in the manner hereinafter provided: provided always, that such rate do not exceed in any one year the sum of two shillings in the pound on the annual value of such buildings and lands."

Sect. 128. "Subject to the provisions next hereinafter contained, the clauses of 'The Towns Improvement Clauses Act, 1847,' with respect to the manner of making rates, (except such of the said clauses as are numbered 179 and 181,) shall be and the same are hereby incorporated with this Act."

Sect. 129. "Provided always, that no person occupying any farmhouse, or buildings connected or occupied therewith, or any lands used as arable, meadow, or pasture ground only, or as woodlands, or market gardens, garden allotments or nursery grounds, and no person entitled to any tithes, cornrent in lieu of tithes, or tithe commutation rent charge, shall be liable to be assessed in respect of the same to the Street Improvement Rate; and that such persons shall be liable to be assessed to the other rates authorized to be levied by this Act at one fourth part only of the net annual value; provided also, that the occupiers of any land covered with water, or used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be rated in respect of the same to the rates authorized to be levied by this Act at one fourth part only of the net annual value."

Sect. 130. "Provided also, that the clause numbered 175 of 'The Towns Improvement Clauses Act,

1861.

THE QUEEN
V.
BIRMINGHAM
Waterworks
Company.

1861.
The QUEEN
v.
BIRMINGHAM
Waterworks
Company.

1847,' herewith incorporated, shall be in force within the borough for a period of eighteen months only from the commencement of this Act, and within the said period the council shall and they are hereby required to cause a new valuation to be made of all the rateable property within the borough; and the clauses of 'The Towns Improvement Clauses Act, 1847,' numbered respectively 176 and 177, shall be applicable to the making of such valuation, and, from and after the completion thereof the rates by this Act authorized shall be assessed and levied in accordance with such valuation: Provided always, that the same may be amended from time to time, and such new valuations made as the council may think fit:" &c.

Sect. 131. "The clauses of 'The Towns Improvement Clauses Act, 1847,' with respect to the rates directed by that Act to be made for sewers, drains, and private improvements, (except clauses 157, 158, 159, 160, 161 and 162 of the same Act,) shall be and the same are hereby incorporated with this Act."

Sect. 133. "Provided also, that no rate, other than the said street improvement rate, the said borough improvement rate, the said water rate, and the rates for private improvements and drainage, mentioned in the clauses herewith incorporated of 'The Towns Improvement Clauses Act, 1847,' and numbered 156, 163, 164, 165 and 166, shall be levied or raised under the authority of this Act, or of any Act or part of Act incorporated herewith."

Stat. 10 & 11 *Vict. c. 34. s. 167.* enacts: "Every rate which the Commissioners are, by this or the special Act authorized to make or levy, shall be made and levied by them at yearly, half yearly or such

other periods, as they think fit, upon every person who occupies any of the prescribed kinds of property, or (if no property be prescribed) any house, shop, warehouse, counting house, coach house, stable, cellar, vault, building, workshop, manufactory, garden, land or tenement whatsoever (except as hereinafter is excepted), within the limits of the special Act, or of the district where such rate is assessed on the occupiers of lands and buildings of a separate district as hereinbefore provided, according to the full net annual value thereof respectively; and the said rates shall be vested in the Commissioners, and shall be payable at such times as they appoint: Provided always, that every person occupying lands used as arable, meadow, or pasture ground only, or as woodlands or market gardens or nursery grounds, shall be rated in respect of the same in the prescribed portion only, if no proportion be prescribed, in the proportion of one third part only of such net annual value thereof as aforesaid."

1861.

The QUEEN
v.
BIRMINGHAM
Waterworks
Company.

Lush, for the respondents. The first question here is that relative to the sewers, but it does not arise on the statute before the Court. [*Huddleston*, who appeared for the appellants, admitted he could not argue that point.]

Secondly, the reservoir within the borough was properly rated to the full extent. Although most of the provisions of The Towns Improvement Clauses Act, 10 & 11 *Vict. c. 34*, are incorporated into The *Birmingham* Improvement Act, 14 & 15 *Vict. c. xciii.*, still some of them are overridden by the latter Act. The effect of the sections 127, 128, 129, is to render rateable every species of land or tenement capable of occupation; and it is

1861.

The QUEEN
v.
BIRMINGHAM
Waterworks
Company.

impossible to contend that a reservoir does not come within this description. In *Adams on Ejectment*, p. 18, 4th ed., "An ejectment will not lie for a watercourse or rivulet, though its name be mentioned, because it is impossible to give execution of a thing which is transient, and always running. But if the ground over which the rivulet runs, belongs to the claimant, the rivulet may be recovered, by laying the action for 'so many acres of land covered with water.' An ejectment may be maintained for a pool or pit of water, because those words comprehend both land and water." A reservoir is, surely, here included. It is true that the 129th section contains a proviso that "the occupiers of any land covered with water, or used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be rated in respect of the same to the rates authorized to be levied by this Act at one fourth part only of the net annual value:" but by "land covered with water" there must be understood ponds, rivers, and the like, which are *naturally* covered with water. The principle on which the exception is founded is that land covered with water is less productive than land which is not; but that cannot apply to land which is covered with water for the purpose of profit. Besides, the exception introduced by the Legislature in favour of "canals" shews that they did not intend to except "reservoirs" and such like pieces of water of artificial construction. This Company and their works are mentioned in sect. 109 of the statute, which section and sect. 114 speak of their "reservoirs;" shewing that the subject was present to the mind of the Legislature, who might, if it had thought fit, have excepted reservoirs from being rated to the full extent.

Thirdly; as to the "pipes and mains," it is difficult to say that they are "land covered with water;" they are rather "water covered with land."

1861.

THE QUEEN
v.
BIRMINGHAM
Waterworks
Company.

Huddleston, for the appellants (having been directed by the Court to address himself to the last point). Pipes and mains are rateable to one-fourth part of the net annual value, as "land covered with water." In cases of this nature the subject matter on which the rate is imposed is not the surface soil. In *Regina v. The West Middlesex Waterworks Company (a)*, *Wightman J.*, in delivering the judgment of the Court, says: "The question is whether the Company are rateable for their mains, which are laid under the surface of the highway, without any freehold or leasehold interest in the soil thereof being vested in the Company. We think they are. These mains are fixed capital vested in land. The Company are in possession of the mains buried in the soil, and so are, *de facto*, in possession of the space in the soil which the mains fill, for a purpose beneficial to itself." It makes no difference, therefore, that pipes and mains are, strictly speaking, water covered with land. Would an open watercourse, running through streets, be the less liable to be rated if a covering of stone or wood were put over it? Or does a canal cease to be land covered with water when it is carried over or through a tunnel? The same holds in the case of a Roman aqueduct.

COCKBURN C. J. With respect to the first of these points that has been argued before us, it is very clear that the statute imposes a rate of one fourth part only

(a) 28 L. J. M. C. 135.

1861.

 The QUEEN
 v.
 BIRMINGHAM
 Waterworks
 Company.

of the net annual value on the occupiers of "land covered with water," and it is impossible to say that a reservoir does not come within that description. The argument of Mr. *Lush* might perhaps be properly addressed to a committee of the House of Commons, when about to legislate on this matter, and consider whether reservoirs ought to have the immunity claimed for them: but the language of the statute before us so plainly includes the matter or thing in question, that it would be going too far to say that for some speculative reason it ought to be held excluded. It is true the Legislature have specified as exempt "canals," which they need not have done; but we cannot on that account take upon ourselves to introduce a limitation on the distinct language of the statute.

On the remaining point, Mr. *Huddleston* has said every thing that could be said in favour of his clients. It would, however, be quite inconsistent with common sense to allow the exception for which he contends.

CROMPTON J. It is plain common sense to say that a pipe, which may or may not have water in it, cannot be looked on as "land" really "covered with water." It might as well be contended that a gas pipe is a pipe covered with gas.

(HILL J. had left the Court.)

BLACKBURN J. concurred.

Judgment for the respondents on the first and third points, and for the appellants on the second.

1861.

WILLIAM TUNSTALL, appellant, *against* JANE
LLOYD, respondent.

Saturday,
April 27th.

3 G. 4. c. 126.
s. 32.

Exemption
from toll.
Volunteers.

STEPHENSON, appellant, *against* TAYLOR,
respondent.

1. Any carriage *bonâ fide* employed in conveying volunteer infantry to, or bringing them back from, a place of military exercise, inspection or review, or on other public duty, is exempt from toll by virtue of The General Turnpike Act, 3 G. 4. c. 126. s. 32.

2. In order to enjoy that immunity the carriage must be employed, ~~not~~ perhaps *exclusively*, but at all events *substantially*, for the conveyance of volunteers: per *Cockburn C. J.*

3. A volunteer corps were assembled at K. by regimental order for "marching out drill," and did march out, and were afterwards dismissed at the head quarters of the regiment. Three members of the corps then hired a hackney carriage, and proceeded towards home, in doing which it was necessary to pass through a turnpike. No one else was in the carriage, and the volunteers were dressed in their uniform, and had their arms and accoutrements according to the regulations of the corps: held, that the carriage was exempt from toll under The General Turnpike Act, 3 G. 4. c. 126. s. 32.

THESE cases are reported together, as relating to the same subject, and having been heard on the same day.

Both turned on the following sections of The General Turnpike Act, 3 G. 4. c. 126.

Sect. 32. "No toll shall be demanded or taken by virtue of this or any other Act or Acts of Parliament, on any turnpike road . . . for the horse or horses of any officers or soldiers on their march or on duty, or for any horse or horses or other beast, or any cart, carriage or waggon employed in carrying or conveying, or returning empty from carrying or conveying, having been employed only in carrying or conveying the arms or baggage of any such officers or soldiers, or employed in carrying or conveying, or returning empty from having been employed in carrying

1861.
 TUNSTALL
 v.
 LLOYD.
 STEPHENSON
 v.
 TAYLOR.

or conveying any sick, wounded or disabled officers or soldiers, or for any waggon, wain, cart or other carriage whatsoever, or the horse or horses, or other cattle drawing the same, employed in conveying any ordnance, or barrack, or commissariat or other public stores of or belonging to His Majesty, or for the use of His Majesty's forces, or returning empty from having been so employed; or for any carriage conveying volunteer infantry, or for any horse furnished by or for any person belonging to any corps of yeomanry or volunteer cavalry or infantry, and rode by him in going to or returning from any place appointed for and on the days of exercise, inspection, or review, or on other public duty, provided that such person shall be dressed in the uniform of his corps, and shall have his arms, furniture and accoutrements according to the regulations of such corps at the time of claiming the exemption. . . ."

Sect. 36. "If any person or persons shall, by any fraudulent or collusive means whatsoever, claim or take the benefit of any exemption from toll or from overweight, or for using any additional horse or horses, or of any other exemption or exemptions whatsoever in this Act contained, every such person shall for every such offence forfeit and pay any sum not exceeding 5*l.*; and in all cases the proof of exemption shall be upon the person claiming the same."

TUNSTALL, appellant, *against* LLOYD, respondent.

THIS was a case stated for the opinion of the Court, under stat. 20 & 21 *Vict. c. 43. s. 2.*, which disclosed the following facts.

At a petty sessions holden at the County Hall, *Abbey Street*, in the township of *Birkenhead*, for the division of

1861.

TUNSTALL

v.
LLOYD.

the hundred of *Wirral*, in the county of *Chester*, on *Thursday*, 6th *September*, 1860, before Major General the Honorable Sir *Edward Cust* and the Reverend *Mark Cazon*, two of her Majesty's justices of the peace for that county; an information preferred by *Jane Lloyd* against *William Tunstall*, under stat. 3 *G.* 4. c. 126. s. 31., charging for that he, on the 23rd *August*, 1860, at the township of *Bidston*, in the county of *Chester*, did fraudulently and forcibly pass through a certain toll gate there situate, called *Bidston* toll gate, on a certain turnpike there, called the *Woodside* and *Hoylelake* turnpike, with a certain omnibus drawn by two horses, without paying the toll, to wit the sum of 8*d.*, then and there payable for those horses, by reason whereof the payment of that toll was then and there avoided, contrary to the statute &c., was heard and determined, the said parties respectively being then present; and upon such hearing the appellant was duly convicted of that offence, and adjudged for that offence to forfeit and pay the penalty of 4*l.*s., and also the sum of 8*d.*, being the toll unpaid, and 10*s.* 6*d.* for costs.

At the hearing of the information it was admitted, on the part of the appellant, that on the day stated in the information he had driven an omnibus through the toll gate in question, and that, unless his right to the exemption hereinafter referred to should be established, a toll of 8*d.* was legally due and payable by him, and that he had in fact refused to pay such toll. But he claimed exemption from the payment of such toll, under stat. 3 *G.* 4. c. 126. s. 32., on the ground that the omnibus in question was at the time of his driving it through the toll gate "A carriage conveying volunteer infantry." In support of this claim of exemption the appellant called *John*

1861.
TUNSTALL
V.
LLOYD.

Scott, a sergeant in the First *Cheshire* Rifle Corps, being a corps of volunteer infantry, who proved that the members of that corps were in the habit of proceeding by an omnibus from *Birkenhead* to *Lasowe*, a distance of upwards of three miles, for ball practice, and at the time stated in the information several members of that corps were so proceeding by the omnibus driven by the appellant; but the witness was unable to swear that on the occasion in question no other persons than volunteers were on the omnibus, nor was any evidence to that effect offered by the appellant. It also appeared, from the evidence of the same witness, that no muster had been made by the sergeant, or other person in authority, to ascertain that none but volunteers were present, and whether the volunteers who had come were in the uniform dress prescribed by the commanding officer to be worn on occasions of drill or practice; and that some of the volunteers riding on the omnibus at the time were not in fact in uniform, and some who were not volunteers were believed to be upon the omnibus on the day in question. Upon this evidence it was contended, on the part of the respondent, that the appellant had failed to bring himself within the exemption referred to—the meaning of the statute, as contended for by the respondent, being that the carriage to be exempt from toll should be *wholly* occupied in conveying volunteer infantry, and that such volunteer infantry should be in uniform, and have their arms, and be mustered in accordance with an order which ought to have been made in that behalf by their commanding officer. It was replied and insisted on by the appellant that it was not necessary that the carriage should be wholly occupied by volunteers, or that the volunteers should be in any uniform, or have their arms,

or wear their accoutrements, in pursuance of any such order of the commanding officer; but the appellant contended that, admitting the proper construction of the words of the statute to be that the carriage, to be exempt, should be wholly occupied in conveying volunteer infantry, still, as he had made out a *prima facie* case of exemption, it was incumbent on the respondent to shew, if she could, by affirmative evidence, that the omnibus was, in fact, conveying other than volunteer infantry. He also contended that the proviso requiring the wearing of uniform, arms and accoutrements, did not apply to the exemption of volunteer infantry, but only to the horses of yeomanry cavalry, described in the words of the statute immediately following the words "volunteer infantry." The justices were of opinion that the appellant had failed to make out his exemption from payment of the toll, and therefore convicted him, and adjudged him to pay the toll demanded, together with the penalty and costs.

The questions of law reserved for the opinion of the Court were: Whether, assuming it to be proved that the carriage was employed in carrying volunteer infantry, the fact that the volunteers were not in uniform, and had not been mustered, and that the omnibus may have also carried others than volunteers, would prevent it from coming within the exemption above referred to. And, supposing the Court to answer that question in the affirmative, whether it was incumbent on the appellant, in order to bring himself within the exemption, to prove, by shewing that the volunteers had been duly mustered, or otherwise to establish in evidence, that the carriage did in fact carry none but volunteers; or whether it was incumbent on the respondent, as prose-

1861.

TUNSTALL
v
LLOYD.

1861.
TUNSTALL
v.
LLOYD.

cutrix, to prove affirmatively that it did carry others than volunteers, and whether the fact that the volunteers were not at the time in question in any uniform, or had not with them their arms or accoutrements, according to any regulation of the corps to which they belonged, disentitled them from claiming the exemption given by the statute.

Brett, for the respondent. The question raised in this case is very important. Section 86 of The Turnpike Act, 3 G. 4. c. 126., imposes the onus of proving exemption from toll on the party claiming the exemption. Here the omnibus was, *prima facie*, liable to toll, and the evidence adduced by the appellant did not rebut that: for he failed in shewing that *all* the persons in and upon the omnibus were volunteers; and it even appears that some of them were not in uniform. It would be impossible for any toll keeper to know how to act if a claim of exemption were allowable under such circumstances. [*Cockburn* C. J. It is not stated in the case whether this was an omnibus publicly plying for hire. If it were, the question would arise whether a public conveyance can come within the exemption at all; unless, indeed, it carried volunteers only, in which case it might perhaps be exempt.]

The COURT then directed this case to stand over until the other case should be heard (*a*).

(*a*) See the next case.

1861.

STEPHENSON
v.
TAYLOR.STEPHENSON, appellant, *against* TAYLOR, respondent.

THE following case was stated for the opinion of the Court under stat. 20 & 21 *Vict. c. 43. s. 2.*

"The appellant is a captain in the First *Surrey Rifle Volunteers*, and the respondent is collector of tolls at *Kennington* turnpike gate, *Surrey*; and on the 12th *June*, 1860, the respondent appeared before me to answer the complaint of the appellant, 'for that he, the respondent, on the 2d day of *June*, 1860, at the parish of *Lambeth*, in the county of *Surrey*, and within the Metropolitan Police District, being then and there the collector of tolls at a certain turnpike gate there situate, did unlawfully demand and take of and from one *George Hodgkins* the sum of 3*d.* as and for toll for a carriage, drawn by one horse, then passing through the said gate, the said *George Hodgkins* being then and there exempt from the payment of such toll by reason that the said carriage was then and there conveying volunteer infantry, and the said *George Hodgkins* then and there claiming such exemption,' contrary to the provisions of stats. 3 *G. 4. c. 126. s. 32.* and 4 *G. 4. c. 95. s. 30.*, the General Turnpike Acts.

"It was proved before me that *Hodgkins* was a volunteer belonging to the before mentioned corps, and that on the 2d *June* he and others, the members of the corps, were assembled at *Kennington*, by regimental order for 'marching out drill,' and did march out, and were afterwards dismissed at the head quarters of the regiment at *Hanover Park, Peckham*; that *Hodgkins* and two other members of the corps then hired a hackney carriage and proceeded towards home, and that it was necessary to

1861.
STEPHENSON
v.
TAYLOR.

pass through *Kennington* turnpike gate to do so; there was no one else in the cab, and the volunteers were dressed in their uniform and had their arms and accoutrements according to the regulations of the corps. The respondent demanded 3*d.* for toll, and *Hodgkins* claimed exemption, which the respondent refused to allow, and *Hodgkins* paid the amount demanded.

“Upon the part of the respondent it was contended that the carriage was not then and there employed in conveying volunteer infantry within the meaning of the statute, and that *Hodgkins* was not entitled to exemption from the payment of toll.

“I was of opinion that the exemption did not extend to carriages used by members of a volunteer corps for their own private ease and convenience, which appeared to be the case on the occasion in question; but was limited to carriages used in performing some public duty requiring the use of a carriage.

“It was argued that the nature of the duty to be performed to give the exemption was shewn by subsequent words in sect. 32 of stat. 3 *G. 4. c.* 126.; and that, if the volunteer was going to or returning from any place appointed for and on the days of exercise, and was dressed in the uniform of his corps, and had his arms, furniture and accoutrements, according to the regulations of such corps, he was exempt from the payment of toll; but, looking carefully at these words, I could not come to this conclusion. It appears to me that those words relate only to the exemption of horses furnished by or for a person belonging to a corps of yeomanry or volunteer cavalry or infantry, and rode by him on the occasion referred to, and not at all to carriages; that, in the consideration of the matter, I was confined to the words

'carriage conveying volunteer infantry;' that I was bound to put a reasonable construction upon these words, in accordance with other provisions in the section relating to the exemption of carriages when used by the regular forces of the kingdom; and that if, under the circumstances of the case before me, the parties were exempt, any carriage, with any number of horses and under any circumstances whatever, so long as the person in whose employment it was belonged to a volunteer corps, would be alike exempt, which I thought could not be intended.

"I therefore dismissed the information.

"The appellant, being dissatisfied with my judgment, has called upon me to state a case for the opinion of the Court of Queen's Bench; and, if the Court should be of opinion that I was wrong, the case will be remitted to me for further proceedings.

"*G. P. Elliott.*"

Garth, for the appellant. This case is both within the letter and the spirit of stat. 3 G. 4. c. 126. s. 32. Here was a "carriage containing volunteer infantry," "returning from public duty," with all their "arms, furniture and accoutrements." The police magistrate was led into error by the erroneous punctuation of the section in some of the printed copies. A comma ought to be inserted after the words "or infantry," and another after the words "rode by him."

Lush, for the respondent. In order to put a just construction on this statute, it will be necessary to look at the general course of legislation on the subject. The first exemption from toll on grounds like the pre-

1861.

STEPHENSON
V.
TAYLOR.

1861.

STEPHENSON
v.
TAYLOR.

sent is found in stat. 44 G. 3. c. 54., "To consolidate and amend the provisions of the several Acts relating to corps of yeomanry and volunteers in *Great Britain, &c.*" The 13th section enacts: "No toll shall be demanded or taken at any turnpike gate or bar for any horses, mares, or geldings, rode by any person belonging to any corps of yeomanry, or by any field officer or staff officer of volunteers, in going to any place for the purpose of exercise, or returning therefrom, &c.; provided always, that every such person shall be dressed in the uniform of his corps, and have his arms and accoutrements according to the regulations provided for such corps at the time of claiming such exemption from toll as aforesaid." Then comes the statute in question, which grants a similar exemption to the regular forces. And, by The Mutiny Act, 13 *Vict. c. 5. s. 78. (a)*, "All Her Majesty's officers and soldiers, being in proper staff or regimental or military uniform, dress or undress, and their horses (*but not when passing in any hired or private vehicle*) and all recruits, marching by route, and all prisoners under military escort, and all enrolled pensioners in uniform when called out for training or in aid of the civil power, and all carriages and horses belonging to Her Majesty or employed in her service under the provisions of this Act, when conveying persons or baggage or returning therefrom, shall be exempted from payment of any duties and tolls on embarking or disembarking from or upon any pier, wharf, quay, or landing place or passing turnpike roads or bridges, &c." These enactments, taken together, shew that the Legislature did not intend to grant volunteers any individual or personal privilege

(a) It is worthy observation that the corresponding clause (sect. 81) in the recent Mutiny Act, 23 & 24 *Vict. c. 9.*, differs from the above.

in this respect; and meant merely that they were to be exempt from toll when acting in discharge of their public duties. [Cockburn C. J. Is there any exemption of volunteers from foot tolls?] Only in some private Acts. If an officer of the regular army loses his exemption from toll when in a private carriage, why should not the same rule extend to an officer of volunteers? [Cockburn C. J. Because it is part of the duty of the regular officer to go to the place where the military exercises are performed. If, therefore he is an infantry officer, and chooses to go luxuriously, he may well lose the exemption. By the Turnpike Act in question, carriages conveying officers or soldiers are not exempt from toll unless they are sick, wounded or disabled.] That has been altered by The Mutiny Act.

1861.

STEPHENSON

V.
TAYLOR.

COCKBURN C. J. I am of opinion that in this case of *Stephenson v. Taylor* the decision of the police magistrate was erroneous, and that he ought to have decided in favour of the complainant. The case should therefore be remitted to him in order that the further necessary proceedings may be taken.

On looking carefully at the 32d section of The Turnpike Act, 3 G. 4. c. 126., on which the question depends, I think it must be understood to mean that any carriage *bonâ fide* employed in conveying volunteer infantry to, or bringing them back from, a place of military exercise, inspection or review, or on other public duty, is entitled to exemption from toll. But, in order to enjoy that immunity, the carriage must be employed (I will not say *exclusively*, but *substantially*) for the conveyance of volunteers. On the one hand, the mere fact of volunteers

1861.

STEPHENSON
v.
TAYLOR.
TUNSTALL
v.
LLOYD.

being in or upon a public vehicle which is plying for hire, and may be used by any person who chooses to avail himself of it, does not confer exemption; but, on the other hand, and I say this with reference to the case of *Tunstall v. Lloyd*, if a carriage is bonâ fide in use for the conveyance of volunteers for the purposes specified in the statute, the mere accidental circumstance of some other persons being in or upon it does not deprive it of its privilege.

In the construction of the enactment before us some difficulty has been occasioned by the erroneous punctuation to be found in some copies of the statute. On the parliament roll there is no punctuation, and we therefore are not bound by that in the printed copies. We can give the section a sensible construction by putting a comma after the words "rode by him," and applying the words at the end of the clause, "in going to or returning from any place appointed for and on the days of exercise, inspection, or review, or on other public duty," to the prior part, i. e., "Any carriage conveying volunteer infantry." Our attention has been called to the provision in The Mutiny Act, 13 *Vict. c. 5.*, relative to the carriage of regular troops. There are, however, obvious distinctions between regular infantry and volunteers. The former are usually stationed in garrison towns, with places near them for exercise: and further, their whole time is devoted to the public service. Volunteers, on the contrary, have usually to go to a distance for exercise: besides which, they have also civil duties to perform. They are persons who, to protect the country from the danger of invasion, give up time valuable to themselves to learn military exercises, and likewise put themselves to considerable expence; and we can quite understand

the Legislature, in order to encourage that spirit in the general public, as saying, "We will give to all such persons as go in carriages to their duty an exemption from toll." A Court ought not to put a strained and forced construction on a statute made for the benefit of volunteers; still less to import into it a provision relative to regular forces which is found in another statute.

1861.

STEPHENSON

v.

TAYLOR.

TUNSTALL

v.

LLOYD.

CROMPTON J. With respect to this case of *Stephenson v. Taylor*, I am entirely of the same opinion; and think both the words and intention of the statute are in accordance with it. The section in question confers exemption on any "carriage conveying volunteer infantry." That cannot mean volunteer infantry in every case, but volunteer infantry going to or returning from their place of exercise: it would be absurd to apply it to every case where volunteer infantry are carried in uniform, as, for instance, to a feast.

The other case of *Tunstall v. Lloyd* is suggested to be that of a public omnibus, which would have gone the way it did, whether volunteers were in it or not; and, if that were so, it could hardly be said to be carrying volunteers within the meaning of this enactment. Perhaps it applies to a public omnibus hired to take volunteers on their journey; but that point will be decided when it arises.

To return, however, to the main question. Mr. *Lush's* argument must go to this, that we are to interpolate some words in the section. Now, I do not see what words to interpolate; besides which, we cannot put words into a statute without something clearly indicating an intention in the Legislature that they should be there. I do not think any light is thrown on this

1861.

STEPHENSON
v.
TAYLOR.
TUNSTALL
v.
LLOYD.

matter by the provisions made by other statutes for the regular army or its officers. As they are persons who give up all their time to public duty, and are paid for it, a difference has been made (in my mind most properly made) between them and volunteers. I think it both reasonable and right, and that it was the intention of the Legislature, to take public burdens off the latter in return for the sacrifice they make of their time to the public.

(HILL J. was absent.)

BLACKBURN J. The doubt in the mind of the police magistrate, in the case of *Stephenson v. Taylor*, seems to have been that the exemption created by this section was limited to carriages engaged in the performance of some public duty requiring the use of a carriage. But, looking at the words, I think the meaning of the Legislature to the contrary is sufficiently expressed. There is a distinction between regular troops and volunteers, which accounts for the difference in the legislation respecting them. Regular troops live in barracks. If infantry, they are not marched out for their muster or exercise to a distance from which they may have to return the next day. Not so with volunteers. Acting on that view, the Legislature say that no duty shall be taken for "any carriage conveying volunteer infantry, or for any horse furnished by or for any person belonging to any corps of yeomanry or volunteer cavalry or infantry, and rode by him in going to or returning from any place appointed for and on the days of exercise, inspection or review, or on other public duty &c." An exemption is here clearly established

in favour of a horse ridden by a volunteer when on public duty. But an infantry volunteer on public duty may require a carriage. He is clearly exempt from toll if he is riding a horse, and it is difficult to see any ground, in reason and sense, why a man is to be exempt from toll because he is riding a horse, but not if he sits in a vehicle behind a horse. The case is quite different from that of an omnibus or stage coach, on which volunteers get up and ride. There it is a question for the justice of the peace before whom the cause is heard to decide whether the omnibus &c. was taking them to the place of duty. I should think if it were plying for hire in the ordinary way it would not be exempt; but I will say no more on that until the question directly arises.

1861.
STEPHENSON
v.
TAYLOR.
TUNSTALL
v.
LLOYD.

In *Stephenson v. Taylor*, judgment for the appellant.

Tunstall v. Lloyd sent back to the justices to be restated (a).

(a) We understand that no further steps will be taken in that case.

STEPHEN WITT, administrator of the effects of
PRISCILLA FLOYD, deceased, against DAVID
AMIS.

Monday,
April 29th.

Policy of in-
surance.
Donatio mortis
causa.

^A policy of life insurance may be the subject of a donatio mortis causa.

ACTION for the conversion by defendant of certain goods and chattels of *Priscilla Floyd*, to wit a policy of insurance, granted by *The Kent Mutual Life Assurance*

1861. *Society*, for 1000*l.*, on the life of the said *Priscilla Floyd*,
 WITT and a certain deposit note for 400*l.*, made by the manager
 v. of *The National Provincial Bank of England*, at *South-*
 AMIS. ampton, whereby the said bank acknowledged to hold
 the said sum of 400*l.* as moneys of the said *Priscilla*
Floyd. The declaration also contained a count in
 detinue, in respect of the same goods and chattels.

Pleas. 1. Not guilty. 2. Non detinet. 3. That the
 goods were not the goods of the plaintiff as administrator.
 Issue on all the pleas.

On the trial, before *Blackburn J.*, at the *London*
 Sittings after *Hilary* Term, 1861, it appeared that the
 defendant and the intestate were engaged to be married,
 and were living together as man and wife. The intestate
 was taken suddenly ill; and, while ill, and afterwards,
 before her death, she gave the policy and deposit note to
 the defendant, saying, "These are yours;" expressing a
 belief that she was dying. The defendant contended
 that this was a *donatio mortis causâ*. The learned Judge
 asked the jury whether they thought the policy and
 deposit note were given to the defendant at a time
 when the intestate thought she was dying. The jury
 found they were. A verdict was entered for the defend-
 ant, leave being reserved to move to enter the verdict
 for the plaintiff if the Court should be of opinion that
 the policy and deposit note could not be the subject of
 a *donatio mortis causâ*.

Parry Serjt., in this Term (a), moved for a rule nisi
 to enter the verdict for the plaintiff, on that ground.
 A policy of insurance cannot be the subject of a *donatio*

(a) *Friday, April 28th. Before Cockburn C. J., Crompton, Hill and*
Blackburn Js.

mortis causâ. The subject matter of a donatio mortis causâ must be something the property in which would pass by delivery; that is the rule given in *Williams on Executors*, vol. i. p. 693. (5th ed.), and which was recognised by the Court in *Miller v. Miller* (a) and in *Ward v. Turner* (b). A bill of exchange, or a cheque payable to bearer, or order, passes by delivery, and therefore, if given in contemplation of death, may be the subject of a donatio mortis causâ; *Veal v. Veal* (c), *Rankin v. Weguelin* (d). So may a mortgage. But not a policy of insurance, the interest in which does not pass by mere delivery. Here there was no regular assignment of the policy. In *Ward v. Turner* (b) it was held that the mere delivery of receipts for *South Sea* annuities was not sufficient to constitute such a gift. The nature of a donatio mortis causâ is fully gone into in *Story on Equity Jurisprudence*, vol. i. c. x. [*Finlason*, amicus curiæ, cited *Barton v. Gainer* (e).]

1861.

WITT

v.

AMIS.

Cur. adv. vult.

COCKBURN C. J., now delivered the judgment of the Court.

In this case we took time to consider whether there is any distinction between a policy of life insurance and a bond or mortgage, as regards its capability of being made the subject of a donatio mortis causâ. We do not think that any such distinction exists; and that a policy of life insurance may be the subject of a gift of that nature. The rule must therefore be refused.

Rule refused.

(a) 3 P. W. 356.

(b) 2 Ves. 431.

(c) 27 Beav. 303.

(d) 27 Beav. 309.

(e) 3 H. & N. 387.

1861.

Friday,
May 3d.

GARTON and another *against* The BRISTOL and EXETER Railway Company.

*Common
Carrier.*

*Railway and
Canal Traffic
Act, 17 & 18
Vict. c. 31.*

*Unreasonable
condition.*

*Bristol and
Exeter Rail-
way Company.
Money had
and received.*

1. A railway Company, carrying on business as common carriers for hire, refused to receive certain goods tendered to them for carriage as such, unless the sender of the goods would sign a condition by which the Company were not to be answerable "for the loss, detention or damage of any package insufficiently or improperly packed, marked, directed or described": Held an unjust and unreasonable condition, both at common law and under the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31.

2. *Semble*, per Cockburn C. J., that a condition imposed by a railway Company carrying on business as common carriers for hire, that "no claim for damage will be allowed unless made within three days after the delivery of the goods, nor for loss unless made within three days of the time that they should be delivered," is unjust and unreasonable.

3. A railway Company, carrying on business as common carriers for hire, refused to receive the goods of *A. B.* on the ground that they were tendered after a quarter past five in the evening, although they did receive the goods of *C. D.* at a later hour: Held, that, in the absence of explanation, this was unlawful conduct in the Company, and *A. B.* having sustained damage in consequence of it, was entitled to recover against them.

4. A declaration alleged that a railway Company, carrying on business as common carriers for hire, refused to carry certain goods unless the sender of the goods would sign "certain unjust and unreasonable conditions": Held, that this allegation was satisfied by proof that one of the conditions thus required to be signed was unjust and unreasonable.

5. *The Bristol and Exeter Railway Company* was incorporated by stat. 6 & 7 W. 4. c. xxxvi., by which it was enacted (inter alia), sect. 174, that all persons should have free access to use the railway with carriages constructed as directed by the Act. Sect. 175, that the Company might charge a tonnage of so much per mile upon all things conveyed along the railway. Sect. 177, that the Company might provide locomotive engines or other power for drawing things upon the railway, and receive such sums for the use of them as they should think proper, in addition to the other sums authorized to be taken. Sect. 178, that they might use locomotive engines or other power, and, in carriages or waggons propelled thereby, convey things along the railway, and make such reasonable charges for conveyance as they might determine upon, in addition to the rates or tolls authorized to be taken. By sect. 183 they were likewise authorized to fix the sum to be charged for small parcels not exceeding 500 lbs. weight each. Sect. 184 enacted, that where things or persons were conveyed for a less distance than six miles, the Company might demand and receive the aforementioned "rates, tolls and charges for conveyance" for six miles; and sects. 185, 186 and 187 contained certain other provisions relative to "rates and tolls only." By sect. 188 they were directed to affix on boards upon their toll houses &c., a list of the rates and tolls directed by them to be taken. By stat. 8 & 9 Vict. c. clv. s. 2. the powers of former Acts regulating the Company are extended to that Act, except such as expired by effluxion of time, or are inapplicable to it, or inconsistent with or provided for by The Lands Clauses Consolidation Act, or with such of the provisions of The Railways Clauses Consolidation Act as were made applicable to that Act. Sect. 18 fixed the sum which the

Company might charge for passengers; and sect. 19 gave a scale of so much a ton per mile, in respect of articles conveyed on the railway. *A. B.* delivered goods to the Company to be carried. These were of different kinds, and were made up in packages, some of which exceeded, and others of which did not exceed, 500 lbs. weight each. The charges made by the Company and paid by *A. B.* for the carriage of the goods on the railway amounted to sums which, (after deducting reasonable sums for the expences of loading and unloading), exceeded the maximum sums authorized to be charged for the carriage of the several kinds of goods respectively by stat. 8 & 9 *Vict. c. clv. s. 19.*: Held that *A. B.* was entitled, under a count for money had and received, to recover back the sums paid by him in excess of the sums authorized to be charged for carriage of goods by 8 & 9 *Vict. c. clv.* upon such of those packages of goods as exceeded 500 lbs. in weight, but not upon the rest.

6. The above Company published a scale of charges at which parcels would be carried along their line, including collection and delivery within certain limits, if delivered by the Company's appointed agents. *A. B.*, a carrier, in the course of his business as such, forwarded from *Bristol*, by passenger and van trains on the railway, parcels of goods which were consigned to his agents residing at various towns and places on the line of the railway for delivery by such agents. On all such occasions the parcels in question were collected by *A. B.* from his customers in *Bristol*, and were taken by him with his own horses, carts and servants to the railway station there, from whence they were forwarded to some other station on the railway. On other occasions the agents of *A. B.*, residing at *Exeter* and other places on the line of the Railway, forwarded thence by passenger and van trains to *A. B.* at *Bristol* parcels of goods for delivery in *Bristol*. On all such last mentioned occasions the parcels were received by *A. B.* at the railway station at *Bristol*, and from thence delivered by him, in his own carts and vans, to the parties in *Bristol* to whom they were directed. The sums paid by *A. B.* to the Company for the carriage on the railway of all the above mentioned parcels which were so respectively forwarded and received by *A. B.* included, in accordance with the rates fixed by the said scale bills, charges for collection and delivery in *Bristol*, though such services were not in fact performed by the Company for *A. B.*: Held that these sums were improperly charged, and might be recovered back under a count for money had and received.

7. The above Company charged *A. B.* certain sums, reasonable in themselves, for carrying his goods along their line, while they carried the like goods for other parties at lower rates: Held that *A. B.* was not entitled, in an action for money had and received, to recover from the Company the excess of the sums paid by him above those paid by the other parties.

8. In the case of the same Company, whenever any of the public (not being carriers) brought and delivered at one time a number of separate parcels or packages to the Company to be carried, if they all contained goods of the same kind or description (such as drugs or drapery), and were addressed to the same party, the Company were in the habit of charging them in the aggregate according to the parcels rates where the aggregate weight did not exceed 500 lbs., and according to the lower or tonnage rates where the aggregate weight exceeded 500 lbs. Whereas if *A. B.* brought a number of separate parcels or packages of the same kind to the Company to be carried, which (though addressed also to the different ultimate consignees for whom they were intended) bore a separate address to *A. B.*, and at the end of the journey were received by him or his agents from the Company, the Company charged *A. B.* for each parcel or package separately. If (as occasionally happened), amongst a number of separate packages so brought by *A. B.* to the Company to be carried, two or more of the same kind were found to be addressed to the same ultimate consignee, the Company aggregated

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

those which were so addressed to the same ultimate consignee, but refused to aggregate the others: Held, that the Company were justified in so charging.

9. In the case of the same Company it appeared that, on various occasions since the publication of the scale bills, *A. B.* brought and delivered goods to the Company to be conveyed, for the conveyance of which goods the Company demanded, and *A. B.* paid, sums exceeding the rates specified in the scale bills. These sums were, in some instances, demanded by the Company's servants through mistake; in other instances, the demand was made intentionally: Concessum, that this claim of the Company could not be supported.

10. *Seemle*, that, in order to entitle the Company to make any of the above charges, they were not bound to affix to their toll-houses &c. boards indicating the amount of their rates and tolls; but

11. Held that, if they even were, their having neglected to do so did not entitle *A. B.* to recover back as money had and received, any of the above payments made by him.

THIS cause came on for trial at the *Bristol* Spring

Assizes, 1860, when, by consent, a verdict was taken for the plaintiffs, with 1000*l.* damages, subject to the award of a barrister: the arbitrator to state the facts, in a special case, for the opinion of this Court; assess the damages contingently on the several counts; and direct whether the verdict should stand, and, if so, for what amount of damages; or whether a verdict ought to be entered for the defendants, or a nonsuit entered, &c.

In accordance with this submission the arbitrator found the facts as follows.

The first count of the declaration stated that the plaintiffs were carriers, and carried on business as such carriers at (amongst other places) *Bristol*, by collecting and receiving from persons goods and packages, to be by the plaintiffs carried from *Bristol* to divers other places, and at such places delivered for hire and reward, which they, the plaintiffs, did by sending such goods and packages by railway from *Bristol* to such places &c.; and the defendants were common carriers of goods and chattels for hire from *Bristol* Station to divers other places; and thereupon, to wit on divers days and times, the plaintiffs caused to be tendered to the

defendants, they being such common carriers as aforesaid, at *Bristol Station* aforesaid (being the place by them then used in the way of their said business as common carriers for the receipt of parcels and goods to be by them carried and conveyed as such common carriers as aforesaid), certain goods of the plaintiffs, and then requested the defendants to receive and to carry and convey the same from *Bristol Station* aforesaid to the said other places to which they were carriers as aforesaid, and the defendants then had ample convenience for receiving and carrying and conveying the same according to the requirement of the plaintiffs in that behalf, and they might, could and ought to have received, carried and conveyed the same as aforesaid, and the plaintiffs were then ready and willing, and then offered, to pay to the defendants such sums of money respectively as the defendants were legally entitled to receive for the receipt and carriage and conveyance of the said goods respectively from *Bristol Station* aforesaid to the respective places aforesaid, and all other charges, whatsoever, which the defendants were then authorized or entitled to make or receive for the receipt, carriage, and conveyance of the said goods respectively, in manner as aforesaid; and the plaintiffs were also ready and willing to perform all just and reasonable conditions, on their part to be performed, to entitle them to have their said goods received, carried, and conveyed by the defendants as such common carriers as aforesaid: of all which the defendants had due notice: Yet the defendants, not regarding their duty as such common carriers as aforesaid, but contriving, and wrongfully and unjustly intending, to injure the plaintiffs, did not, nor would, when they were so requested as aforesaid, or at any time afterwards, re-

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

ceive, carry, or convey the said goods respectively from *Bristol* Station aforesaid to the respective places aforesaid, but wholly neglected and refused so to do, unless the plaintiffs signed certain unjust and unreasonable conditions, with reference to the receipt, carriage, and conveyance of the said goods; whereby the plaintiffs were forced and obliged to and did procure the said goods to be carried and conveyed from *Bristol* Station aforesaid to the respective places aforesaid at much greater expence than the plaintiffs were ready and willing to pay, and the defendants were entitled to receive, for the same carriage and conveyance of the said goods as aforesaid, and were also delayed in the conveyance of the said goods as aforesaid for divers long spaces of time, and were greatly injured in their trade and business as carriers.

The second count stated that the plaintiffs were such common carriers as aforesaid; and the defendants, before and at the times thereafter mentioned, were common carriers of goods and chattels for hire from *Bristol* to certain other places; and the plaintiffs, to wit on divers days, at reasonable times, caused to be tendered to the defendants, they then being such common carriers as aforesaid, at *Bristol* Station as aforesaid (being the place by them then used, in the way of their said business as common carriers, for the receipt of parcels and goods to be by them carried and conveyed, as such common carriers as aforesaid), certain goods of the plaintiffs, and then requested the defendants to receive the same for the purpose of being carried and conveyed by the defendants as such common carriers as aforesaid; and the defendants then had ample convenience for receiving, carrying, and conveying the same, according to the requirement

of the plaintiffs in that behalf, and the plaintiffs were then ready and willing, and then offered, to pay to the defendants such sum of money as the defendants were legally entitled to receive for the receipt and carriage of the said goods respectively, and all other charges whatsoever which the defendants were then authorized or entitled to make or receive, for the receipt and carriage of the said goods respectively, and were ready and willing to perform all just and reasonable conditions on their part: of which the defendants had due notice: Yet the defendants, not regarding their duty as such common carriers as aforesaid, but contriving, and wrongfully and unjustly intending, to injure the plaintiffs (though they did receive at the said times, and up to a later hour of the evening of the said days than a quarter past 5 o'clock, the goods of a certain other person for the purpose of being carried and conveyed by them as such common carriers as aforesaid), did not nor would, at the said times, being later than a quarter past 5 o'clock in the evening of the said days, when they were so requested as aforesaid, receive the said goods of the plaintiffs to be carried and conveyed by them; but wholly neglected and refused so to do, on the ground that the goods were tendered after a quarter past 5 o'clock in the evening of the days, which was an unjust, unreasonable, and illegal excuse for not receiving, carrying, and conveying the said goods as aforesaid; whereby the plaintiffs had been delayed in the conveyance of the said goods, and had been greatly injured in their trade and business of carriers.

The third count was for money payable by the defendants to the plaintiffs for money received by the defendants to the use of the plaintiffs, and for money

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

1861.
GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

found to be due from the defendants to the plaintiffs on accounts stated between them. And the plaintiffs claimed 1000*l*.

The defendants pleaded.

First, to the first and second counts, Not guilty.

Secondly, as to the first count, a denial that the plaintiffs were ready and willing, or offered, to pay the defendants such sums of money as the defendants were legally entitled to receive for the receipt and carriage and conveyance of the goods respectively from *Bristol* Station to the respective places in that count mentioned, and the other charges which the defendants were authorized or entitled to make or receive for the receipt, carriage, and conveyance of the goods respectively.

Thirdly, as to the second count, a similar denial to that contained in the preceding plea.

Fourthly, as to the second count; that by a regulation of the defendants, of which the plaintiffs, before the committing of any of the alleged grievances in that count mentioned, had due notice, the defendants, during all the time mentioned or referred to in the second count, closed their offices at the *Bristol* Station for the receipt of goods intended to be carried by their goods trains of the same evening at a quarter past 5 o'clock, and refused to receive after that time any goods for carriage by such goods trains of the same day, except goods which had been prepared, assorted, and packed by an agent of the defendants elsewhere, and which were brought to the station so prepared, assorted, and packed, and ready to be loaded and put on the trucks at the station; and that such regulation was reasonable and necessary for the due and proper

transacting and carrying on of their trade and business as carriers; and that such exception therefrom was a reasonable and proper exception, having regard to the greater facilities of loading and dispatching the goods to which such exception applied; and that such regulation and exception respectively were not made for the purpose of giving any undue preference, favour, or advantage to their agent or to themselves as such carriers.

Fifthly, as to the residue of the declaration, Never indebted.

The plaintiffs took and joined issue on all the above pleas, and demurred also to the fourth plea; and the defendants joined in demurrer.

The plaintiffs were common carriers, having their principal office at *Bristol*, and were in the habit of carrying goods for hire between that place and various places in the *West of England*; employing for that purpose *The Bristol and Exeter Railway Company*, as common carriers, to convey the goods on their railway as far as was convenient to them, the plaintiffs performing the parts of the journey to and from the Company's stations by their own agents and servants.

The defendants are *The Bristol and Exeter Railway Company* mentioned in and incorporated by the stat. 6 & 7 *W. 4. c. xxxvi.*, "for making a railway from *Bristol* to *Exeter*, with branches to the towns of *Bridgewater*, in the county of *Somerset*, and *Tiverton*, in the county of *Devon*;" and mentioned in the several subsequent Acts of Parliament relating to *The Bristol and Exeter Railway Company*, viz. 3 & 4 *Vict. c. xlvii.* and 8 & 9 *Vict. c. clv.*, all of which were to be referred to as part of the present case.

1861.

GARTON
V.
BRISTOL
and
EXETER
Railway
Company.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

In support of the first count of the declaration the plaintiffs proved that, according to the general practice on the defendants' railway, all persons delivering goods to the defendants to be carried were required to furnish the defendants with a note in writing of the names of the sender and consignee, and the description and weight of the goods. These notes, commonly called "forwarding notes," were frequently prepared and filled up by the senders of the goods themselves. In other instances, where the senders had omitted to do this, the notes were made out upon printed forms which were supplied by the defendants, and which, after the particulars above mentioned had been filled up in writing by their clerks, were required to be signed by the person bringing the goods to the station. The forms of forwarding notes which were so supplied by the defendants, and required by them to be signed, besides containing in the body a separate column or heading for each of the particulars above mentioned, referred to certain conditions indorsed thereon (similar to those which will be mentioned presently) as the conditions on which the goods would be carried by the defendants. The defendants, however, did not always insist upon forwarding notes in such last mentioned form being signed by persons delivering goods to them to be carried, and persons (not carriers) had been constantly in the habit of delivering goods to the defendants or their agents to be carried without signing any other kind of forwarding notes than notes containing merely the names of the sender and consignee and the description and weight of the goods.

On the 4th *March*, 1858, and at divers other times between that day and the commencement of this suit, the plaintiffs tendered to the servants of the defendants,

at the railway station at *Bristol*, different parcels of goods to be carried by the defendants to *Bridgewater* and other places on the defendants' line of railway. Upon each of such occasions the plaintiffs tendered to the defendants' servants, together with the proper charge for the receipt and carriage of the goods, a note in writing of the names of the sender and consignee and the description and weight of the goods. On each occasion, however, the defendants' servants refused to receive the goods so brought by the plaintiffs to be carried unless the plaintiffs would sign a printed form of forwarding note filled up by the defendants' servants, and referring to certain conditions indorsed thereon in the form annexed to this case, marked A. The plaintiffs, disputing the right of the defendants to carry the goods subject to the conditions indorsed on such last mentioned forwarding notes, refused to sign the same; and thereupon the defendants refused to receive or carry the goods of the plaintiffs, who were in consequence obliged to send the goods through other carriers, and thereby incurred expence.

If the Court should be of opinion that the plaintiffs were entitled to recover damages in consequence of the defendants' refusal to receive or carry their goods under the circumstances above mentioned, then the arbitrator awarded a verdict to be entered for the plaintiffs on both the issues joined on the first count, with 40s. damages. But, if the Court should be of opinion that the plaintiffs were not so entitled to recover, then the verdict to be entered for the defendants on the first issue joined on the first count, and for the plaintiffs on the second issue joined on the first count.

Under the second count it was proved that, in addi-

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

than they could have done in case they had employed the plaintiffs. By these means the trade of the plaintiffs, as carriers, was considerably diminished, and they sought, under the second count, to recover damages from the defendants for such diminution of their trade, resulting from what they contended was the wrongful act of the defendants in closing the *Bristol* Station to them under the circumstances above mentioned.

If the Court should be of opinion that the plaintiffs were so entitled to recover, then the arbitrator assessed the amount of damages at 270*l.*, and directed the verdict to be entered for the plaintiffs on all the issues joined on the second count. But if the Court should be of opinion that the plaintiffs were not so entitled to recover, then he directed the verdict to be entered for the defendants on the first issue joined on the second count, and for the plaintiffs on the other issues joined on the second count.

The plaintiffs' particulars of demand stated that, under the money count in the declaration, the plaintiffs sought to recover 290*l.* 4*s.* 11*d.* for overcharges demanded and taken by the defendants from the plaintiffs in respect of the carriage of certain goods carried by the defendants for the plaintiffs between 8th *April*, 1853, and the commencement of the action.

During the whole of this period disputes constantly existed between the plaintiffs and the Company on the subject of the latter's charges for the carriage of the plaintiffs' goods on the railway. On the 29th *June*, 1855, the plaintiffs caused a written notice to be served on the Company, informing them that they disputed their charges, and only paid the same because the Company compelled them to do so by detaining their goods,

and that in future all payments made by them or their agents would be paid under protest until further notice. The above notice was never withdrawn by the plaintiffs. Both before and after this notice also the plaintiffs' servants, who from time to time paid on their account the Company's servants for the charges for carriage herein-after mentioned, were in the habit, at the time of paying, of protesting against the charges as excessive and illegal; and it was understood between the defendants' servants (who received the charges) and the plaintiffs' servants (who paid them) that they were always paid under protest, and such charges were, in fact, always paid by the plaintiffs unwillingly, and in order to have their goods carried or delivered, the defendants refusing to carry their goods, or to deliver them after they were carried, unless the plaintiffs would pay them.

The first claim of the plaintiffs under the money count was to recover back from the defendants the amount paid by the plaintiffs to the defendants, under the circumstances of compulsion above mentioned, of charges for the carriage of goods on the defendants' railway in excess of those limited by stat. 8 & 9 *Vict. c. clv. & 19*.

The goods to which this portion of the plaintiffs' claim applied were forwarded by the plaintiffs on the *Bristol and Exeter* Railway (including the main line as well as the branch railways authorized to be made by stat. 8 & 9 *Vict. c. clv.*) to and from *Bristol* and other towns and places on the line of the railway at different times between the 24th *May* 1853 and the 13th *January*, 1859, both inclusive. The goods in question were of different kinds, and were made up in packages, some of which exceeded, and

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

than they could have done in case they had employed the plaintiffs. By these means the trade of the plaintiffs, as carriers, was considerably diminished, and they sought, under the second count, to recover damages from the defendants for such diminution of their trade, resulting from what they contended was the wrongful act of the defendants in closing the *Bristol* Station to them under the circumstances above mentioned.

If the Court should be of opinion that the plaintiffs were so entitled to recover, then the arbitrator assessed the amount of damages at 270*l.*, and directed the verdict to be entered for the plaintiffs on all the issues joined on the second count. But if the Court should be of opinion that the plaintiffs were not so entitled to recover, then he directed the verdict to be entered for the defendants on the first issue joined on the second count, and for the plaintiffs on the other issues joined on the second count.

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During the whole of this period disputes constantly existed between the plaintiffs and the Company on the subject of the latter's charges for the carriage of the plaintiffs' goods on the railway. On the 29th *June*, 1855, the plaintiffs caused a written notice to be served on the Company, informing them that they disputed their charges, and only paid the same because the Company compelled them to do so by detaining their goods,

and that in future all payments made by them or their agents would be paid under protest until further notice. The above notice was never withdrawn by the plaintiffs. Both before and after this notice also the plaintiffs' servants, who from time to time paid on their account the Company's servants for the charges for carriage herein-after mentioned, were in the habit, at the time of paying, of protesting against the charges as excessive and illegal; and it was understood between the defendants' servants (who received the charges) and the plaintiffs' servants (who paid them) that they were always paid under protest, and such charges were, in fact, always paid by the plaintiffs unwillingly, and in order to have their goods carried or delivered, the defendants refusing to carry their goods, or to deliver them after they were carried, unless the plaintiffs would pay them.

The first claim of the plaintiffs under the money count was to recover back from the defendants the amount paid by the plaintiffs to the defendants, under the circumstances of compulsion above mentioned, of charges for the carriage of goods on the defendants' railway in excess of those limited by stat. 8 & 9 *Vict. c. clv. s. 19*.

The goods to which this portion of the plaintiffs' claim applied were forwarded by the plaintiffs on the *Bristol and Exeter* Railway (including the main line as well as the branch railways authorized to be made by stat. 8 & 9 *Vict. c. clv.*) to and from *Bristol* and other towns and places on the line of the railway at different times between the 24th *May* 1853 and the 13th *January*, 1859, both inclusive. The goods in question were of different kinds, and were made up in packages, some of which exceeded, and

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

others of which did not exceed, 500 lbs. weight each.

The charges made by the defendants and paid by the plaintiffs for the carriage of the goods on the railway amounted to sums which (after deducting reasonable sums for the expences of loading and unloading) exceeded the maximum sums authorized to be charged for the carriage of the several kinds of goods respectively by stat. 8 & 9 *Vict. c. clv. s. 19*. The plaintiffs claimed to recover back the sums paid by them in excess of that Act upon the whole of those packages of goods above mentioned, whether exceeding or not 500 lbs. weight each. The total amount of the sums so paid by the plaintiffs in excess was 57*l.* 3*s.*, and of this amount 27*l.* 11*s.* 6*d.* was paid by them in respect of packages exceeding 500 lbs. weight each. The defendants contended, first, that the plaintiffs were not entitled to recover back the sums so paid by them in excess, or any part thereof; and, secondly, that stat. 8 & 9 *Vict. c. clv. s. 19*. applies only to packages of goods exceeding 500 lbs. weight each, and that therefore the plaintiffs were, at all events, only entitled to recover back the sums paid by them in excess of those limited by that Act in respect of such of the packages of goods as severally exceeded that weight.

If the Court should be of opinion that the plaintiffs were entitled to recover back the sums paid by them in excess of those mentioned in stat. 8 & 9 *Vict. c. clv. s. 19*. upon all the packages of goods, whether exceeding or not 500 lbs. weight each, then the arbitrator assessed the amount which the plaintiffs were entitled to recover in respect of this head of claim at the sum of 57*l.* 3*s.* But if the Court should be of opinion that the plaintiffs were entitled to receive back the sums so paid by

them in excess upon such only of the packages of goods as exceeded 500 lbs. weight each, then he assessed the amount which the plaintiffs were so entitled to recover at the sum of 27*l.* 11*s.* 6*d.*

The second claim of the plaintiffs was to recover back certain sums which, in addition to the charges for carriage from station to station, they had paid to the defendants for the collection and delivery of divers parcels forwarded by the plaintiffs by passenger and van trains on the defendants' railway under the following circumstances.

In *November*, 1855, the defendants published a bill containing a scale of charges at which parcels would be conveyed on the *Bristol and Exeter* Railway by ordinary passenger trains, and by van trains. This bill (a copy of which, marked B., accompanied the case) purported to be a scale of parcel charges to or from any station on the railway, including collection and delivery within certain limits, if delivered by the Company's appointed agent, and contained the following charges for parcels forwarded by ordinary passenger trains.

Not exceeding	$\frac{1}{4}$ lb.	1 lb.	3 lbs.	7 lbs.	14 lbs.	21 lbs.	28 lbs.	42 lbs.	56 lbs.	84 lbs.	112 lbs.
Charge - -	<i>s. d.</i> 0 4	<i>s. d.</i> 0 6	<i>s. d.</i> 0 7	<i>s. d.</i> 0 9	<i>s. d.</i> 0 10	<i>s. d.</i> 1 2	<i>s. d.</i> 1 6	<i>s. d.</i> 1 9	<i>s. d.</i> 2 0	<i>s. d.</i> 2 6	<i>s. d.</i> 3 0

One penny to be charged for every additional four pounds, and all fractional parts to be charged as four pounds. The bill also contained similar scales of charges for parcels forwarded by van trains, a slight difference being made in such charges according as the distances exceeded or not forty miles. By a subsequent bill, published by the defendants in *December*, 1855 (a copy of which,

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

marked C., accompanied the case), a reduction was made in the van parcel charges with regard to certain articles mentioned in such bill. Such reduced charges, however, continued to include collection and delivery in the same manner as the charges under the first bill. From *December*, 1855, to the commencement of the present action, the two scale bills above mentioned continued to be in force, and to regulate the charges for all parcels forwarded by passenger or van trains on the defendants' railway.

On divers days between the 14th *May*, 1856, and the 16th *February*, 1859, both inclusive, the plaintiffs, in the course of their business as carriers, forwarded from *Bristol*, by passenger and van trains on the *Bristol* and *Exeter* Railway, parcels of goods which were consigned to their agents residing at various towns and places on the line of the railway for delivery by such agents. On all such occasions the parcels in question were collected by the plaintiffs from their customers in *Bristol*, and were taken by them with their own horses, carts and servants to the railway station there, from whence they were forwarded to some other station on the railway. On other occasions during the same period the plaintiffs' agents, residing at *Exeter* and other places on the line of the *Bristol* and *Exeter* Railway, forwarded thence by passenger and van trains to the plaintiffs at *Bristol* parcels of goods for delivery in *Bristol*. On all such last mentioned occasions the parcels were received by the plaintiffs at the railway station at *Bristol*, and from thence delivered by them, in their own carts and vans, to the parties in *Bristol* to whom they were directed.

The sums paid by the plaintiffs to the defendants for the carriage on the railway of all the above mentioned

parcels which were so respectively forwarded and received by the plaintiffs as aforesaid included, in accordance with the rates fixed by the said scale bills, charges for collection and delivery in *Bristol*, though such services were not in fact performed by the defendants for the plaintiffs. These sums, however, were always paid by the plaintiffs under protest, and they claimed to deduct and recover back so much of the sums paid by them in respect of each of the above mentioned parcels as was equivalent to a reasonable charge for the collection or delivery in *Bristol* (according to the circumstances) of each of those parcels. Evidence with regard to the amount of such reasonable charge for collection and delivery in *Bristol* was adduced before the arbitrator.

If the Court should be of opinion that the plaintiffs were entitled to recover in respect of this head of claim, then he assessed the amount which the plaintiffs were so entitled to recover at 2*l.* 14*s.* 9*d.*

The third claim of the plaintiffs was to recover back the sums paid by them to the defendants for the carriage of certain goods called "*Manchester packs*" from *Bristol* to *Exeter*, and of goods of every kind (except tea and tobacco) from *Bristol* to *Bridgewater*, in excess of the sums charged by the defendants to other persons for the carriage of the like goods from and to the same places respectively, under the circumstances hereinafter mentioned.

A considerable traffic in the goods called *Manchester packs* has always existed between *Manchester* and *Exeter*. The mode of conveyance of these goods is by the *Midland Railway* from *Manchester* to *Bristol*, and from the latter place by the defendants' railway to *Exeter*. The station of *The Midland Railway Company* at *Bris-*

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

tol is at some little distance from the station of the defendants' Company at the same place, and the charge made to the public by *The Midland Railway Company* for the carriage of *Manchester* packs from *Manchester* to *Bristol*, during the period to which the present claim referred, was 30*s.* per ton, including delivering to the defendants at their station at *Bristol*, or 28*s.* 6*d.* from *Manchester* to the station of *The Midland Railway Company* at *Bristol*; an allowance of 1*s.* 6*d.* being made by the last mentioned Company to those consignees of the goods at *Bristol* who were willing, at their own expence, to cart the goods from the station of *The Midland Railway Company* at *Bristol* to the defendants' station at the same place. During the years 1856, 1857 and 1858, divers quantities of the above mentioned goods were consigned by certain tradesmen and others at *Manchester* to the plaintiffs at *Bristol* for the purpose of their being forwarded by the plaintiffs, as common carriers, to persons residing in *Exeter*. These goods were usually received by the plaintiffs at the station of *The Midland Railway Company* at *Bristol*, and carted thence by them to the station of *The Bristol and Exeter Railway Company*, the plaintiffs, in such cases, paying to *The Midland Railway Company* the sum of 28*s.* 6*d.* per ton for the carriage of the goods. In some instances the goods so consigned to the plaintiffs were delivered by *The Midland Railway Company* at the defendants' station at *Bristol*, and in all such cases the plaintiffs paid to *The Midland Railway Company* the sum of 30*s.* per ton for the carriage and delivery of the goods from the station of *The Bristol and Exeter Railway Company* at *Bristol*. The goods in question were forwarded on the defendants'

railway by the plaintiffs to their agents at *Exeter*, who received them at the railway station there, and at the same time paid to the defendants the charges demanded by them for the carriage of the goods, such charges amounting to the sum of 22s. 6d. per ton. During the same period the defendants also, as common carriers, were in the habit of receiving from *The Midland Railway Company*, and transmitting by their own railway to *Exeter*, *Manchester* packs, which were consigned by tradesmen and others at *Manchester* to persons residing in *Exeter*. These goods were forwarded from *Manchester* to the care of *Wall*, the defendants' agent at *Bristol*, and were received by him at the station of *The Midland Railway Company* at that place, and thence carted by him to the defendants' station there, for transmission on the railway to *Exeter*. For the services so performed by the defendants' agent in *Bristol*, it appeared that, pursuant to arrangement between *The Midland Railway Company* and the defendants, *The Midland Railway Company* allowed to the defendants a larger deduction than the sum of 1s. 6d. from the full charge of 30s. per ton above mentioned. From the defendants' station at *Bristol* the last mentioned goods were forwarded on the defendants' railway to *Exeter*, and there delivered by the defendants, or their agents, to the persons in *Exeter* to whom they were addressed, such persons, at the same time, paying to the defendants the through charges for the carriage of the goods from *Manchester* to *Exeter*, amounting to the sum of 51s. 8d. per ton, which sum included the charge for delivery in *Exeter*. The charges so made by the defendants (after deducting those due from the defendants to *The Midland Railway Company* at the rates charged by the

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

Company to the public) did not exceed, in respect of the carriage from the defendants' station at *Bristol* to *Exeter*, the sum of 21s. 8d. per ton, including delivery in *Exeter*. Prior to and since the commencement of the year 1856, the rates which the defendants professed to charge for the carriage of goods from *Bristol* to *Bridgewater* by the ordinary goods trains were 6s. 8d. per ton for first class goods, 8s. 4d. per ton for second class goods, 12s. 6d. per ton for third class goods, and 16s. 8d. for fourth class and fifth class goods respectively, which said several rates of charge were for the carriage of goods from station to station only.

Notwithstanding the rates at which the defendants professed to carry as above mentioned, the defendants, throughout the years 1856, 1857, 1858 and 1859, carried goods of every kind (except tea and tobacco) for certain tradesmen and other persons at *Bridgewater* (not being carriers), by the ordinary goods trains, from the railway station at *Bristol* to the respective premises of such tradesmen and others at *Bridgewater*, at an uniform rate of 6s. per ton for all kinds of goods, including the charge for delivery in *Bridgewater*. Those tradesmen and others for whom the defendants carried at the above rate had, prior to the year 1856, been in the habit of receiving by water from *Bristol* some of the goods which they required to be sent from that place to *Bridgewater*. And the consideration for the defendants consenting to carry for such tradesmen and others, at the rate of 6s. per ton, was an agreement (usually a verbal one only), by such persons respectively, that they would in future have all goods which they might require to be sent to them from *Bristol* conveyed by the defendants' railway instead of by water. And such agreements were in fact

performed by the persons by whom they were made. The amount of goods, however, which each of such persons forwarded on the defendants' railway in the course of the year was small compared with the amount of goods annually forwarded by the plaintiffs on that railway. From time to time during the years above mentioned the plaintiffs, in the course of their business as carriers, forwarded by goods trains on the defendants' railway, from the station at *Bristol* to *Bridgewater*, large quantities of goods (other than tea and tobacco), for all of which the defendants demanded, and the plaintiffs paid, the full rates of carriage first above mentioned. On the arrival of all such goods at *Bridgewater* they were received by the plaintiffs or their agents at the station at *Bridgewater*, and by them delivered at their own expence to the parties for whom they were intended.

As soon as the plaintiffs became aware that the defendants carried from *Bristol* to *Exeter*, and from *Bristol* to *Bridgewater*, for other persons at lower rates than were charged to the plaintiffs, they applied to the defendants to be placed on the same footing as those other persons with regard to the rates of carriage for like goods forwarded by them from and to the same places respectively. But the defendants always refused to make the same or any reduction of their rates in favour of the plaintiffs.

If the Court should be of opinion that the plaintiffs were entitled to recover back from the defendants the sums charged to and paid by them for the carriage of the goods above mentioned from *Bristol* to *Exeter*, and from *Bristol* to *Bridgewater*, in excess of the sums charged to and paid by the other persons mentioned for the carriage of like goods from and to the same

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

places respectively, under the above circumstances, then the arbitrator assessed the amount which the plaintiffs were so entitled to recover at the sum of 20*l.* 10*s.*

The fourth claim of the plaintiffs was to recover back from the defendants certain alleged overcharges for the carriage of the plaintiffs' goods from *Bristol* to *Exeter* and from *Bristol* to *Bridgewater*, the circumstances connected with such overcharges being precisely similar to those stated under the last head of claim, with the addition of the following fact which the arbitrator found; viz. that all the items of charge to which the present claim related, besides being (as was alleged under the last head) in excess of the sums charged by the defendants to other persons for the carriage of like goods under the same circumstances, were in excess of the rates mentioned in stat. 8 & 9 *Vict. c. clv. s. 19.* And hence the plaintiffs sought to recover the overcharges included in the present claim, as well upon this latter ground as upon the ground relied on and stated under the last head.

If the Court should be of opinion that, upon the ground already stated under the last head, the plaintiffs were entitled to succeed, the other ground would become immaterial; and in that case the arbitrator assessed the amount which the plaintiffs were entitled to recover in respect of the present claim at the sum of 38*l.* But if the Court should be of opinion that the plaintiffs were not entitled to recover upon the ground stated under the last head, but that they were entitled to recover so much of the sums paid by them for the carriage of the goods as exceeded the rates mentioned in stat. 8 & 9 *Vict. c. clv. s. 19.*, then the arbitrator assessed the amount which the plaintiffs were so entitled to recover at the

sum of 15*l.* 3*s.* 2*d.* or 6*l.* 9*s.* 2*d.*, according as the Court should be of opinion that that section applies to all packages of goods, whether exceeding or not 500 lbs. weight each, or only to such packages as exceed 500 lbs. weight each.

The fifth claim of the plaintiffs related to certain sums which the plaintiffs sought to recover back, upon the ground of a different mode of charging having been adopted by the defendants when several parcels or packages of goods of the same nature were delivered at the same time by the plaintiffs to the defendants to be carried, and when such several parcels or packages were delivered by one of the public; the plaintiffs in such case being charged upon each parcel separately, and not upon the aggregate weight, according to the defendants' scale bills, as the public were charged.

The mode of charging for goods carried on the railway which had been adopted by the defendants, and had been in force since the 5th *November*, 1855, is the following. For the purpose of more conveniently making the charges for the carriage of goods on the railway, all goods are divided by the defendants into five classes, the class to which each description of goods belongs being shewn by a printed alphabetical list or classification of goods, which refers each of the goods therein mentioned to a particular class. In addition to this list, the defendants, acting under the powers given in their Acts, published two scale bills. One of these, called "The Local Goods and Cattle Rates Bill," shews the charge for goods in each class to be made per ton, and so in proportion, for carrying goods from any one station to any other station on the said railway. The charges fixed by this bill are, for convenience, herein-

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

1861. after called the "tonnage rates." The other of the
GARTON scale bills furnishes a scale for ascertaining the charges
v. to be made on packages or parcels not exceeding 500 lbs.
BRISTOL weight each, which, for convenience, are hereinafter called
and the "parcels rates." These parcels rates are greater
EXETER in amount than the tonnage rates. As a general rule,
Railway also, the rates of charge for parcels weighing fractional
Company. parts of 500 lbs. diminish as the weights of the parcels in-
crease. Whenever any of the public (not being carriers)
brought and delivered at one time a number of separate
parcels or packages to the defendants to be carried, if
they all contained goods of the same kind or description
(such as drugs or drapery), and were addressed to the
same party, the defendants were in the habit of charg-
ing them in the aggregate according to the parcels rates
where the aggregate weight did not exceed 500 lbs.,
and according to the lower or tonnage rates where the
aggregate weight exceeded 500 lbs. Whereas if the
plaintiffs brought a number of separate parcels or pack-
ages of the same kind to the defendants to be carried,
which (though addressed also to the different ultimate
consignees for whom they were intended) bore a sepa-
rate address to the plaintiffs, and at the end of the
journey were received by them or their agents from the
defendants, the defendants charged the plaintiffs for
each parcel or package separately. If (as occasionally
happened), amongst a number of separate packages so
brought by the plaintiffs to the defendants to be carried,
two or more of the same kind were found to be ad-
dressed to the same ultimate consignee, the defendants
aggregated those which were so addressed to the same
ultimate consignee, but refused to aggregate the others.
In accordance with the above mode of charging pur-

sued by the defendants, the arbitrator found that, on various days between the 6th *January*, 1856, and the commencement of this action, the plaintiffs brought and delivered to the defendants, to be carried as aforesaid, divers packages of goods of the same kind, but always at the same time. These packages were all addressed to the plaintiffs, but were intended for different ultimate consignees, whose names and addresses were also to be found on the packages, though such names and addresses were usually concealed by the plaintiffs' address, which was pasted over them. Upon each occasion the defendants demanded, and the plaintiffs paid, a separate charge for each of the packages so brought by the plaintiffs, the total amount of which separate charges exceeded the sum which the charge for such packages would have amounted to if the same had been aggregated and charged for at the rates mentioned in the defendants' scale bills respectively. When the plaintiffs complained to the defendants (as they from time to time did) of the above mode of charging, the defendants assigned no other reason than the fact of such separate packages being intended for different ultimate consignees. Under these circumstances the plaintiffs sought to recover back, as overcharges, the difference between the sums which they paid for the carriage of those packages of goods respectively, according to the above mode of charging, and the sums which they would have paid for such carriage if those packages had been charged on the aggregate weight according to the defendant's scale bills.

If the Court should be of opinion that the plaintiffs were so entitled to recover, then the arbitrator assessed the amount under this head of claim at 6*l.* 12*s.* 2*d.*

1861.

GARTON
v.
BRISTOL
and
EXETER,
Railway
Company.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

The sixth claim of the plaintiffs related to a precisely similar set of overcharges with those complained of and stated under the last head, with this difference only, viz. that the amount of charges paid by the plaintiffs upon each occasion for such separate packages of goods (though not exceeding the rates mentioned in the defendants' scale bills) exceeded the sum to which the charge for such goods (if aggregated) would have been limited by stat. 8 & 9 *Vict. c. clv. s. 19*.

If, upon the grounds stated under this and the preceding head of claim, the Court should be of opinion that the plaintiffs were entitled to recover back so much of the sums paid by them in respect of those separate packages of goods as exceeded the sums limited by stat. 8 & 9 *Vict. c. clv. s. 19*. for the carriage of such goods respectively when aggregated, then the arbitrator assessed the amount which the plaintiffs were so entitled to recover at 2*l.* 3*s.* or 1*l.* 15*s.* 5*d.*, according as the Court should be of opinion that that 19th section applies to all packages of goods, whether exceeding or not 500 lbs. weight each, or only to such packages as exceed 500 lbs. weight each.

The seventh claim of the plaintiffs was to recover certain alleged overcharges by the defendants beyond the amounts which ought to have been charged by them for the carriage of the plaintiffs' goods according to the rates expressed in the defendants' scale bills. The nature of which scale bills, and the circumstances under which they were respectively published by the defendants, have been already stated under the fifth head of claim.

It was proved, on behalf of the plaintiffs, that, on various occasions since the publication of those scale

bills, the plaintiffs brought and delivered goods to the defendants to be conveyed by the ordinary goods trains, for the conveyance of which goods the defendants demanded, and the plaintiffs paid, sums exceeding the rates specified in the scale bills. These sums were, in some instances, demanded by the defendants' servants through mistake; in other instances, the demand was made intentionally: and the plaintiffs paid the sums demanded under the circumstances of compulsion hereinbefore mentioned.

If the Court should be of opinion that the plaintiffs were entitled to recover those overcharges under the circumstances above mentioned, then the arbitrator assessed the amount of such overcharges at 3*l.* 18*s.* 3*d.*

The sums which the plaintiffs claimed to recover back from the defendants, as overcharges under the seven several heads of claim above stated, were all distinct sums, and were sought to be recovered upon separate and independent grounds.

If the Court should be of opinion that the plaintiffs were entitled to recover the whole of the sums so assessed by the arbitrator under the above several heads respectively, or any one or more of such sums, then the arbitrator directed that a verdict be entered for the plaintiffs for the total amount of such sums or sum upon the issue joined on the plea of Never indebted, so far as such issue related to money received by the defendants for the use of the plaintiffs, and that, as to the residue of that issue, a verdict be entered for the defendants.

In addition, however, to the above mentioned grounds, upon which the plaintiffs sought to recover, in any event, the sums assessed by the arbitrator, under the above several heads of claim respectively, the plaintiffs con-

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

tended that they were entitled to recover the entire amount of overcharges claimed by them, upon the following ground, viz., that the defendants had, during the whole period over which the plaintiffs' claim extended, omitted to set up or affix boards containing lists of the several rates or tolls appointed by them to be taken, as required by stat. 6 & 7 W. 4. c. xxxvi.

By that Act, which is the Company's Act of incorporation, the defendants were authorized to charge and take for the conveyance of goods on the railway the several rates and tolls mentioned in the Act.

And sect. 188 enacted that the Company should cause to be painted on boards, and to be affixed and continued, and renewed as often as the same should be obliterated or defaced, to or upon every toll-house or building at which any of the rates or tolls by that Act authorized should be collected or received, in some conspicuous place, in large and legible characters, an account or list of the several rates and tolls which the Company should, from time to time, direct and appoint to be taken, and which should be payable by virtue of that Act; and, in case any owner or master of or person having or assisting in the charge of any carriage passing upon the railway, or any collector of the rates or tolls aforesaid, should, after and whilst such account or list should be affixed as aforesaid, demand or take more than the amount thereon specified, such owner, master, collector, or other person as aforesaid should forfeit and pay any sum not exceeding 5*l.* for every such offence.

And sect. 189 further enacted that it should not be lawful for the Company to demand or take any rates or tolls, for or in respect of any article, matter, or thing, or any carriage, passenger or cattle, carried or conveyed

upon or along the railway, except during the time that the board should be affixed as aforesaid.

Stat. 8 & 9 *Vict. c. clv.*, which received the Royal Assent on the 31st *July*, 1845, after reciting stat. 6 & 7 *W. 4. c. xxxvi.* and certain other Acts relating to the *Bristol and Exeter Railway*, enacts, in sect. 2, that all the provisions, matters, and things, contained in the recited Acts relating to the *Bristol and Exeter Railway*, or any of them, so far as the same are unrepealed, and except such as expired by effluxion of time, or are inapplicable to that Act, or inconsistent with or provided for by The Lands Clauses Consolidation Act, or with or by such of the clauses and provisions of The Railway Clauses Consolidation Act as are made applicable to that Act, shall extend to that Act, and to the several purposes and things thereby authorized, as fully and effectually as if the same provisions, matters, and things had been re-enacted in that Act with reference to the objects and purposes thereof.

By sect. 19 the charges which the defendants were authorized to take for the conveyance of goods on the railway were limited to the sums mentioned in that section.

The plaintiffs contended that the provisions of stat. 6 & 7 *W. 4. c. xxxvi.*, with reference to boards containing lists of the rates and tolls authorized to be taken by that Act, apply equally to the several rates or sums mentioned in stat. 8 & 9 *Vict. c. clv. s. 19.*

The whole of the plaintiffs' claim, under the last count of the declaration, arose since the passing of the last mentioned Act. The defendants never, since the passing of that Act, set up or affixed boards

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

1861.
 GARTON
 v.
 BRISTOL
 and
 EXETER
 Railway
 Company.

containing such lists or accounts as are mentioned in stat. 6 & 7 W. 4. c. xxxvi. s. 188. ; and upon this ground the plaintiffs sought to recover the whole amount of overcharges claimed by them, amounting to the sum of 160*l*.

If the Court should be of opinion that the plaintiffs were entitled to recover the amount claimed by them, then the arbitrator directed that a verdict be entered for the plaintiffs for 160*l*, in lieu of the amount before directed to be entered for them upon the issue joined on the plea of Never indebted, so far as the same related to money received by the defendants to the use of the plaintiffs; and that, as to the residue of such issue, a verdict be entered for the defendants. If the Court should be of opinion that the plaintiffs were not entitled to recover the last mentioned claim of 160*l*, nor the sums assessed by the arbitrator under the foregoing heads of claim respectively, or any of them, then the arbitrator directed the verdict upon the issue joined on the plea of Never indebted to be entered for the defendants, &c.

The following was the form of the forwarding note accompanying the award, and marked A. It contained sixteen conditions, but it is unnecessary to set out any except the 4th.

“ A.

“ FORWARDING NOTE.

“ Entered _____ Station _____ 18__

“ To *The Bristol and Exeter Railway Company.*

“ Receive for transit as per address and particulars

on this Note the undermentioned Goods on the Conditions stated on the other side.

" Sender _____

Taking Column.	No. of Truck.	Name of Consignee.	Residence.	To what Station.	No.	Description of Goods.	Weight.				Amount.		
							Tons.	cwts.	qrs.	lbs.	£	s.	d.

" Outwards Porter _____ "

" *The Bristol and Exeter Railway Company* give public notice."

"4thly. That they will not be answerable for the loss of or for damage to any goods arising from fire, civil commotion, tempest, or act of God, nor for loss, detention or damage of wrappers, boxes, or returned empties of any description, nor for any goods put into returned wrappers, boxes, or empties, nor for any goods left until called for or to order, or left or warehoused for the convenience of the parties to whom they are consigned, nor for the loss detention or damage of any package insufficiently or improperly packed, marked, directed or described, or containing variety of articles liable by breaking to damage each other, nor for leakage arising from bad casks or cooperage, nor for damage to cast iron work, furniture or other goods of a slight construction. And they give notice that no claim for damage will be allowed unless made within three days after the delivery of the goods, nor for loss unless made within three days of the time that they should be delivered."

" 1st March, 1857."

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

It is likewise unnecessary to set out B. and C., the scales of parcels charges annexed to the award.

The case was argued, on the 30th *April* and 3d *May*: before *Cockburn C. J., Crompton, Hill and Blackburn Js.*

Collier, for the plaintiffs. With respect to the first count. The defendants are common carriers, and as such are bound to carry all goods brought to them to be carried, without requiring any special agreement to be signed by the senders; provided of course that they have room for the goods, that the price of the carriage is tendered, and that the goods are such as they are in the habit of carrying: *Coggs v. Bernard (a)*, *Wyld v. Pickford (b)*, *Johnson v. The Midland Railway Company (c)*. They act as common carriers so far as the bulk of mankind is concerned, but they seek to impose certain special conditions on persons who, like the plaintiffs, use the railway as carriers; and the arbitrator has not found any reason to justify their making such a difference. The other side will rely on The Railway and Canal Traffic Act, 17 & 18 *Vict. c. 31*. Sect. 2 enacts: "Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantages to or in favour of any parti-

(a) 2 *Ld. Raym.* 909.

(b) 8 *M. & W.* 443.

(c) 4 *Exch.* 367.

cular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf." Then comes sect. 7: "Every such company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void: provided always, that nothing herein con-

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

tained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the Court or Judge before whom any question relating thereto shall be tried to be just and reasonable" &c. Several of the conditions sought to be imposed by the defendants are not "just and reasonable" within this section. First, that portion of the 4th condition is unreasonable in which the defendants say that they will not be answerable "for the loss, detention, or damage of any package insufficiently or improperly packed, marked, directed, or described;" and a condition in those words has been held bad in *Simons v. The Great Western Railway Company* (a). During the argument of that case *Jervis C. J.* asks, "What has the insufficiency of the package to do with the detention of the goods?" [*Blackburn J.* Right or wrong, that case is expressly in point in your favour. *Cockburn C. J.* It is so; that case is decisive on that point. The Court of Common Pleas there, however, seem also to intimate an opinion on a point which it was not necessary to decide; namely, that the condition that "no claim for damage will be allowed unless made within three days after the delivery of the goods, nor for loss unless made within three days of the time that they should be delivered," is just and reasonable within the statute—a proposition which, with great deference to that Court, I consider very questionable. Three days is a very short time. Perhaps the consignee may not open the package until the fourth day, when he finds the goods damaged through the negligence of the Company's servants; and the

(a) 18 *Com. B.* 805.

consignee who does not receive goods may not know that they have been sent to him, while the consignor may not know that they have not reached their destination.] [*Collier* also argued against several other of the conditions, but the decision of the Court on the 4th condition renders it unnecessary to insert the arguments upon them.]

With respect to the second count. The special plea which the defendants have pleaded to this count, in addition to the general issue and a traverse of the readiness and willingness of the plaintiffs, and of their offer to pay to the defendants the sums to which they were legally entitled for the conveyance of the goods, has been negatived by the finding of the arbitrator. The point raised by this count has been decided against the defendants in *Garton v. The Bristol and Exeter Railway Company* (a); and the course which the Company are described in this plea as having adopted is against the policy of The Railway and Canal Traffic Act, 17 & 18 Vict. c. 31., which intends that these public companies shall deal equally with all persons.

Then as to the money count. The first claim under it is one of charge in excess of the rates allowed by stat. 8 & 9 Vict. c. clv. This question depends on the provisions of that statute taken in connection with those of the previous Act, 6 & 7 W. 4. c. xxxvi. Stat. 6 & 7 W. 4. c. xxxvi. incorporates the Company, and enacts as follows.

Sect. 174. "All persons shall have free access to pass along and upon and to use and employ the said railway, with carriages properly constructed as by this Act directed, upon payment only of such rates and tolls as

(a) 6 Com. B. N. S. 639.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

1861.

GANTON
v.
BRISTOL
and
EXETER
Railway
Company.

shall be demanded by the said Company, not exceeding the respective rates or tolls by this Act authorized, and subject to the provisions of this Act, and to the rules and regulations which shall from time to time be made by the said Company or by the directors by virtue of the powers to them respectively by this Act granted."

Sect. 175. "It shall be lawful for the said Company to demand and receive and recover to and for the use and benefit of the said Company, for the tonnage of all articles, matters, and things which shall be conveyed upon or along the said railway any rates or tolls &c. not exceeding the following:" (the section then gives a scale of so much per ton per mile according to the articles carried).

Sect. 177. "It shall be lawful for the said Company and they are hereby empowered to provide locomotive or stationary engines or other power for the drawing or propelling of any articles, matters, or things, persons, cattle, or animals upon the said railway, and also along and upon any other railway communicating therewith, and to receive, demand, and recover such sums of money for the use of such engines or other power as the said Company shall think proper, in addition to the several other rates, tolls, or sums by this Act authorized to be taken."

Sect. 178. "It shall be lawful for the said Company and they are hereby authorized, if they shall think proper, to use and employ locomotive engines or other moving power, and in carriages or waggons drawn or propelled thereby to convey upon the said railway, and also along or upon any other railway communicating therewith, all such passengers, cattle, and other animals, goods, wares, and merchandize, articles, matters, and

things, as shall be offered to them for that purpose, and to make such reasonable charges for such conveyance as they may from time to time determine upon, in addition to the several rates or tolls by this Act authorized to be taken : provided always, that it shall not be lawful for the said Company, or for any person using the said railway as carriers, to charge for the conveyance of any passenger upon the said railway any greater sum than the sum of $3\frac{1}{4}d.$ per mile, including the toll or rate hereinbefore granted."

Sect. 179. Packages containing goods of a dangerous quality are to be marked.

Sect. 180. Passengers are entitled to carry a certain amount of luggage without extra charge.

Sect. 181. The Company are not prevented from hiring locomotive engines.

Sect. 183. The Company are authorized to fix the sum to be charged for small parcels, not exceeding 500 lbs. weight each. " Provided always, that the provision hereinbefore contained shall not extend to articles, matters, or things, sent in large aggregate quantities, although made up of separate and distinct parcels, such as bags of sugar, coffee, meal, and the like, but only to single parcels, unconnected with parcels of a like nature which may be sent upon the railway at the same time."

Sect. 184. " Provided always, and be it further enacted, that in all cases where any of the above mentioned articles, matters, things, or persons shall be conveyed on the said railway for a less distance than six miles, the said Company are hereby empowered to demand and receive the afore mentioned rates, tolls, and charges for conveyance, as the case may be, for six miles, exclusive of a reasonable charge for the expence of loading and

1861.

GARTON
V.
BRISTOL
and
EXETER
Railway
Company.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

unloading the articles, matters, or things, in case where the loading and unloading shall be done by the said Company, and which charge the said Company are hereby authorized to make."

Sect. 185. ("Without prejudice to any of the provisions hereinbefore contained,) in all cases in which there is a fraction of a ton a proportion of the said rates or tolls may be demanded and taken for such fraction according to the number of quarters of a ton contained therein, and when there shall be a fraction of a quarter of a ton such fraction shall be deemed and considered as a quarter of a ton; and in all cases in which there shall be a fraction of a mile in the distance which any carriage shall pass upon the said railway beyond six miles or any greater number of miles, the proportion of the rates or tolls which shall be demanded and taken for such fraction shall be after the rate of the number of quarters of a mile contained therein; and when there shall be a fraction of a quarter of a mile such fraction shall be deemed and considered as a quarter of a mile; and in order to ascertain and calculate with greater precision and facility the distance for which such rates or tolls shall be demanded and taken upon the said railway the said Company shall cause the said railway to be measured, and stones or other conspicuous marks, with proper inscriptions thereon, to be set up and maintained along the whole line thereof at the distance of a quarter of a mile from each other."

By sect. 186, the Company are empowered to reduce "all or any of the rates or tolls" &c.

By sect. 187, "the afore mentioned rates and tolls to be taken by virtue of this Act shall at all times be charged equally" &c.

Sect. 188. "The said Company shall cause to be painted on boards, and to be affixed and continued, and renewed as often as the same shall be obliterated or defaced, to or upon every toll-house or building at which any of the rates or tolls by this Act authorized shall be collected or received, in some conspicuous place, in large and legible characters, an account or list of the several rates and tolls which the said Company shall from time to time direct and appoint to be taken, and which shall be payable by virtue of this Act; and in case any owner or master of or person having or assisting in the charge of any carriage passing upon the said railway, or any collector of the rates or tolls aforesaid, shall after and whilst such account or list shall be affixed as aforesaid, demand or take more than the amount thereon specified such owner, master, collector, or other person as aforesaid shall forfeit and pay any sum not exceeding 5*l.* for every such offence."

Sect. 189. "Provided always, and be it further enacted that it shall not be lawful for the said Company to demand or take any rates or tolls for or in respect of any article, matter, or thing, or any carriage, passenger, or cattle, carried or conveyed upon or along the said railway, except during the time that the said board shall be so affixed as aforesaid, and for and during such time only as the stones or other conspicuous marks, with proper inscriptions thereon, by this Act directed to be set up for ascertaining the distance for which such rates or tolls shall be taken, shall remain so set up."

Then stat. 8 & 9 *Vict. c. clv.* enacts,

Sect. 18. "It shall not be lawful for the Company to demand or receive any greater sum in respect of the carriage of passengers conveyed on the railway

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

than" (here the section gives the rate per mile which may be charged in respect of each passenger of the different classes): "Provided always that if any such passenger be conveyed for a less distance than six miles it shall be lawful for the said Company to demand and receive tolls as for six miles."

Sect. 19. "It shall not be lawful for the Company to charge in respect of the several articles, matters, and things hereinafter mentioned, conveyed on the railway, any greater sum &c. than the several sums hereinafter mentioned (that is to say)" (the section then gives a scale of so much per ton per mile, according to the articles carried, which scale is higher than that in the former Act.)

It appears, from several of the above sections of stat. 6 & 7 W. 4 c. xxxvi. that, at the time when it was passed, the Legislature contemplated that the carriage of goods along railways would chiefly be conducted by persons using their own engines and carriages for the purpose, leave however being reserved to the Companies to use theirs for the same purpose. The whole code of charges established by that statute was framed with that view; and it is all repealed, and a new code substituted for it, by stat. 8 & 9 Vict. c. clv., which was passed at a time when the above notion had been completely abandoned. As to goods above 500 lbs. weight, the plaintiffs are clearly entitled to judgment, both on principle and in consequence of the decision in *Garton v. The Bristol and Exeter Railway Company* (a); where it was held that stat. 8 & 9 Vict. c. clv. applies to the whole line of railway, and not to the junction and branch railways

(a) 4 H. & N. 33; affirmed in Exch. Ch., 5 Jur. N. S. 1172, and in H. L., 7 Jur. N. S. 173.

only. [*Blackburn J.* Stat. 8 & 9 *Vict. c. clv.* may be inconsistent with the 175th and 177th sections of stat. 6 & 7 *W. 4. c. xxxvi.*; but how is it inconsistent with sect. 183, which gives the Company the power of charging as they please with respect to small parcels?] The Legislature, in stat. 8 & 9 *Vict. c. clv.*, has not expressly excepted small parcels, and these are the Company's own Acts, which must be viewed as contracts made with the public, and, as such, construed most strictly against the Company. Besides, sect. 183 of the former Act applies only to cases where small parcels are carried by the Company; not where such parcels are carried on the railway by other persons. [*Hill J.* Suppose, then, an attorney were to make up a parcel of briefs, and deliver it at the railway station at *Bristol* to be carried to *Exeter*; at what rate should it be charged?] According to the tonnage rates under stat. 8 & 9 *Vict. c. clv.* [*Hill J.* The question is, whether you can apply that rate where a parcel cannot be weighed so as to get a ton, or some aliquot part of a ton. If it is to be understood as applying only to goods exceeding 500 lbs. weight, the rule is clear and intelligible.]

The second claim under the common count is with respect to the sums charged for collection and delivery of parcels forwarded by the plaintiffs. The first case on this subject is *Pickford v. The Grand Junction Railway Company* (a); but the point has been determined against the defendants in *Bazendale v. The Great Western Railway Company* (b) and *Garton v. The Great Western Railway Company* (c).

(a) 8 *M. & W.* 372.(b) 5 *Com. B. N. S.* 336.(c) 5 *Com. B. N. S.* 669.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

The third claim under the common count is divisible into two parts. 1. That relative to the goods called "*Manchester Packs*." 2. That relative to certain other goods carried from *Bristol* to *Bridgewater*. *Bazendale v. The North Devon Railway Company* (a) is an authority against this claim : which is likewise a charge for collection and delivery. Moreover, with respect to the contracts made by the defendants with parties at *Bridgewater* to the prejudice of the plaintiffs, this point also has been decided against the defendants in *Garton v. The Bristol and Exeter Railway Company* (b). [Hill J. No question was made in that case as to whether money had and received would lie under such circumstances. Can you recover what you paid to the defendants, under a count for money had and received to your use, because they charged some other persons at a lower rate than yourself? Their having done so does not render the charge they made to you an unreasonable one.] Their making such a distinction in favour of others renders the charge to the plaintiffs an unreasonable one. The Company are enjoined by the statute not to make illegal charges. [Crompton J. The charging another person too little is not charging you too much. *Cockburn* C. J. Suppose the Company choose, from some motive of mere favour, to convey the goods of *A. B.* for nothing, could every person else to whom they made a charge recover it back as money had and received, unless there was proof of damage?] Yes. The amount to which they favour others can make no difference. *Parker v. The Great Western Railway Company* (c) shews that that form of action will lie under the cir-

(a) 30 *L. T.* 133.(b) 6 *Com. B. N. S.* 639.(c) 7 *M. & Gr.* 253.

cumstances of this case. [*Blackburn J.* There the charge made was unreasonable. Here that is not suggested.] These charges were paid under protest.

The fourth claim under the common count involves the same question as that under the third, with the addition that the charges were in excess of those allowed by stat. 8 & 9 *Vict. c. clv.*

The fifth claim under that count is decided against the defendants by the second point in *Parker v. The Great Western Railway Company (a)*.

The sixth claim is the same as the fifth, with the addition of the charges being in excess of those allowed by stat. 8 & 9 *Vict. c. clv.*

The seventh claim is founded on overcharges made to the plaintiffs beyond the rates in the scale bills of the defendants; and the fact found in the case, that some of them were made through mistake, is immaterial. The Railways Clauses Consolidation Act, 8 & 9 *Vict. c. 20.*, the provisions of which are, by sect. 2 of stat. 8 & 9 *Vict. c. clv.*, incorporated with that Act unless when inconsistent with it, enacts, in sect. 93: "A list of all the tolls authorized by the special Act to be taken, and which shall be exacted by the Company, shall be published by the same being painted upon one toll board or more in distinct black letters on a white ground, or white letters on a black ground, or by the same being printed in legible characters on paper affixed to such board, and by such board being exhibited in some conspicuous place on the stations or places where such tolls shall be made payable."

The last point is, whether the Company are not bound by their earlier Act, 6 & 7 *W. 4. c. xxxvi. ss. 188.*

(a) 7 *M. & Gr.* 253.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

1861.

 GARTON
 v.
 BRISTOL
 and
 EXETER
 Railway
 Company.

189., to affix upon their toll-houses, &c., boards containing lists of the rates or tolls which they intend to take. [*Hill J.* Does that apply except to persons using the railway in their own conveyances? *Cockburn C. J.* Sect. 184 distinguishes between rates and tolls, and charges for conveyance; whereas sects. 185, 186 and 187 speak entirely of rates and tolls, leaving out charges for conveyance. *Blackburn J.* Sect. 177, after enacting that the Company may provide locomotive engines &c., says: it shall be lawful for the Company to "receive, demand, and recover such sums of money for the use of such engines &c. as the said Company shall think proper, in addition to the several other rates, tolls or sums." That is rather in favour of the plaintiffs. Sect. 178 contemplates one class of tolls on persons employing the Company to carry goods for them on the railway; another, on persons conveying goods on the railway themselves.

Kinglake Serjt., for the defendants. The grievance alleged in the first count is, not that the defendants refused to carry these goods, except upon certain conditions, but that they refused to carry them except on certain conditions which were unjust and unreasonable. Now, even supposing the conditions were unjust and unreasonable, still that does not give the plaintiffs a right of action against the defendants, if they are not common carriers, and have always professed to carry on those conditions only. They had a right to impose conditions previous to The Railway and Canal Traffic Act, 17 & 18 Vict. c. 81.; and that Act has not taken away the right to impose reasonable ones. They may not have been in the habit of carrying for all persons on

the same terms; and a common carrier has not, in all cases, a right to know the contents of a package delivered to him to carry: per *Maule J.*, in *Crouch v. The North Western Railway Company (a)*. [*Hill J.* There is an express allegation in this declaration that the defendants were common carriers for hire, which is not denied by the pleadings, and, consequently, must be taken as admitted on the record; and one issue on the first count is, did they refuse to receive these goods for the purpose of carriage unless the plaintiffs would sign certain unreasonable terms?]. With respect, then, to the conditions themselves. The fourth is, that the defendants will not carry, except on the condition that they are not to be answerable "for the loss, detention, or damage of any package insufficiently or improperly packed, marked, directed, or described." The plaintiffs rely on *Simons v. The Great Western Railway Company (b)*, in which such a condition was held bad, where an article was *lost*, which is not the case here. [*Blackburn J.* How can we, as a Court of merely co-ordinate jurisdiction, hold this condition good against the decision of the Court of Common Pleas in that case? What you might do with the question in a Court of error is a different thing. If so, there is no use in arguing the other conditions; for, if one of them is unjust and unreasonable, it is as bad for your case as if one hundred were.] If the Court considers itself bound by *Simons v. The Great Western Railway Company (b)*, it may be useless to discuss the other conditions. [*Hill J.* We think we are bound by that case.] The declaration, however, alleges that the defendants "refused to carry except on certain unjust and unreasonable conditions;"

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

(a) 14 Com. B. 255, 294.

(b) 18 Com. B. 805.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

an allegation which is not satisfied by proof that *one* of those conditions was unjust and unreasonable; *White v. The Great Western Railway Company* (a). [Cockburn C. J. In that case it was held that all the conditions there were reasonable.]

Then as to the second count. It is difficult to understand the meaning of this count—whether it means that the defendants gave a preference to others to the prejudice of the plaintiffs, or that the defendants did not receive the goods from the plaintiffs, although tendered within a reasonable time for carriage. If the former, the plaintiffs are deprived of remedy in this form by the 6th section of The Railway and Canal Traffic Act, 17 & 18 *Vict. c. 31.*, which enacts: “No proceeding shall be taken for any violation or contravention of the above enactments, except in the manner herein provided; but nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or company against any railway or canal or railway and canal company under the existing law.” [Blackburn J. The statutory remedy applies only to the future; for the past it leaves matters as they were. Crompton J. This count seems objectionable as stating what is mere matter of evidence. The only material allegations in it are, that the defendants were common carriers, and that the plaintiffs were ready and willing to perform all just and reasonable conditions, but that the defendants refused to carry.]

Then, as to the common count. As to the first claim under it: by sect. 2 of stat. 8 & 9 *Vict. c. clv.* the powers of former Acts regulating the Company are extended to that Act, except such as have expired by

(a) 2 *Com. B. N. S. 7.*

effluxion of time, or are inapplicable to that Act, or inconsistent with or provided for by The Lands Clauses Consolidation Act, or with or by such of the clauses and provisions of The Railways Clauses Consolidation Act as were made applicable to that Act &c. There is no inconsistency between the 19th section of this Act and the 183d section of the previous Act, 6 & 7 W. 4. c. xxxvi. It is absurd to suppose that, under the earlier Act, the Company, when carrying things under 500 lbs. weight, were compelled to charge for them according to a tonnage rate.

As to the second question, namely that relating to the collection and delivery. [*Cockburn C. J.* Can you distinguish this from *Baxendale v. The Great Western Railway Company*(a) and the other case in the same volume?] Those cases relate to goods charged at a certain rate per ton: here there were only small parcels, the sums collected in respect of which are very trivial, and the trouble in collecting which has been considerable. [*Hill J.* You charge to the full extent for the carriage of the goods, and in addition to that you charge for a collecting and delivery, services which the arbitrator finds were not performed by you. *Crompton J.* You cannot maintain a charge for services which you have not performed. *Cockburn C. J.* Besides which, those cases in the Common Pleas put you out of Court.]

On the third claim under the common count, the Court has already pronounced its judgment in favour of the defendants.

The fourth claim is the same as the third, with the addition of the charges being in excess of stat. 8 & 9 Vict.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

(a) 5 Com. B. N. S. 336.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

c. clv. In *Garton v. The Bristol and Exeter Railway Company* (a), which has been cited on the other side, the Court intimate an opinion that, if the Company had charged lower rates to particular individuals for the purpose of meeting competition by another railway company or another mode of carriage, in consideration of their sending large quantities of goods for carriage, their judgment might have been different; and that fact is here supplied by the opinion of the arbitrator. [Cockburn C. J. Yes. If that was done for the purpose of advancing the interests of the Company as a *railway company*, and not, as here, to give an advantage to others or to themselves *off the railway*.]

As to the fifth head under the common count. In *Bazendale v. The Eastern Counties Railway Company* (b) the Court said that, where a number of separate packages are all addressed to the same person, they are easily accessible at a station; but if to a number of persons, extra trouble is involved. Here the plaintiffs brought to the defendants to be carried divers packages of goods of the same kind at the same time. It is found by the arbitrator that these packages were all addressed to the plaintiffs, but were intended for different ultimate consignees, whose names and addresses were also to be found on the packages, though usually concealed by the plaintiffs' address, which was pasted over them. For those on which the names of the ultimate consignees were not thus concealed the defendants had a right to make a separate charge.

The sixth question is the same as the fifth, with the addition of involving the small parcels question under stat. 6 & 7 W. 4. c. xxxvi.

(a) 6 Com. B. N. S. 639.

(b) 4 Com. B. N. S. 63.

With respect to the seventh question, as to the Company having exceeded the rate in the scale bills: the general provisions of stat. 6 & 7 W. 4. c. xxxvi. are merely that the Company are to make reasonable charges. This question is hardly worth discussing, the amount of excess during six years amounting only to 3*l.* 18*s.* 3*d.*

(On proceeding to discuss the last point, he was stopped by the Court.)

Collier, in reply. *Crouch v. The North Western Railway Company* (a), which has been cited on the other side, confirms the cases cited on the part of the plaintiffs relative to the duties of common carriers. *Bazendale v. The Eastern Counties Railway Company* (b) is based entirely on the ground of additional trouble given to the Company.

COCKBURN C. J. In delivering our judgment in this case it will be necessary for me to advert to the different heads of complaint which arise upon the declaration, together with the pleadings and the findings of the arbitrator in his award.

The plaintiffs in the first count complain that the defendants, who were common carriers, declined to receive goods tendered to them by the plaintiffs for conveyance, on tender of such sums of money as they were legally entitled to receive for that purpose, "unless the plaintiffs signed certain unjust and unreasonable conditions." The declaration proceeds on the statement and assumption that the defendants were common carriers, and the plea of Not guilty which they have pleaded

(a) 14 *Com. B.* 255.

(b) 4 *Com. B. N. S.* 63.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

to this count does not take issue on that fact; the only issue of fact raised and insisted on under that plea being whether the conditions sought to be imposed by the defendants on the plaintiffs were reasonable or unreasonable. In the course of the argument it was virtually admitted that one of those conditions, i. e. the fourth, which the plaintiffs were called on to sign before the defendants would receive the goods for conveyance, was, if the authority of the case of *Simons v. The Great Western Railway Company* (a) is to be supported, an unreasonable and unlawful condition; and, that being so, it appears to me that the plaintiffs are entitled to recover on that count. I take the law with respect to the obligations of common carriers to be clear. Persons holding themselves out to the world as common carriers are bound to act as such in respect to such goods as they profess to carry, and have accommodation to carry, on such goods being tendered to them to be carried, and, on a reasonable tender of proper remuneration, without subjecting the person tendering them to any unreasonable condition. Here it is found as a fact that the defendants (admitted on the record to be common carriers, and therefore bound by the law as I have stated it,) have sought to impose as conditions terms which were unreasonable, and which it was not competent to them to seek to impose. The effect of that has been to prevent the plaintiffs from having their goods conveyed except by submitting to those unreasonable terms, to which they were not bound by law to submit; and the arbitrator therefore properly awarded damages for that. On this ground, therefore, that count, supported as it is by the facts found, entitles the plaintiffs to our judgment.

(a) 18 Com. B. 805.

It has however been put, on the part of the defendants, that, by The Railway and Canal Traffic Act, 17 & 18 Vict. c. 31., they are allowed to protect themselves against the responsibility which the law attaches to common carriers by insisting on these conditions, and calling on parties who tender their goods for carriage to sign them. The Legislature has wisely attached to the right which it gives to common carriers by railway or canal thus to protect themselves against liability, the provision that the conditions they impose shall be just and reasonable; and to that provision, thus relied on by the defendants, the answer is that the arbitrator has found, and, under the circumstances, the Court considers has properly found, facts shewing that one of the conditions was not just and reasonable. Consequently the defendants, who are common carriers, were, as much by statute law as by common law, precluded from insisting on the terms of that condition.

I pass on to the second count, which, according to the best construction we can put upon it, (for the count is not according to the artistic rules of pleading, inasmuch as it is argumentative and sets out evidence), in substance, amounts to this,—that the defendants declined to take the plaintiffs' goods, to be conveyed by their railway, under circumstances which made it reasonable and proper that they should have done so; and that fact has been found for the plaintiffs. The substance of the complaint is that the defendants imposed an unreasonable condition, namely that the goods should be brought to them at an unreasonable time, when they received those of other persons after the time they had fixed for the plaintiffs; here again, therefore, a condition is imposed

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

on which the defendants had no right to insist, and the plaintiffs accordingly are entitled to our judgment.

Then come the questions on the money count. The first head relates to overcharge; and this leads us to the consideration whether the defendants were bound to charge for the carriage of these goods according to the tonnage rate provided by stat. 8 & 9 *Vict. c. clv. s. 19.*, or whether they were at liberty to charge according to certain provisions in the earlier Act, 6 & 7 *W. 4. c. xxxvi.* It is not disputed, on the part of the plaintiffs, that, according to stat. 6 & 7 *W. 4. c. xxxvi.*, the defendants would be entitled to make these charges on parcels under 500 lbs. weight. It is admitted that, by the decision of the House of Lords in *Garton v. The Bristol and Exeter Railway Company (a)*, stat. 8 & 9 *Vict. c. clv. s. 19.* does override stat. 6 & 7 *W. 4. c. xxxvi.* in respect to parcels exceeding 500 lbs. in weight. It must be equally admitted that, as regards such as are less than 500 lbs., the Company (if stat. 8 & 9 *Vict. c. clv.* had not passed) would have been entitled to make the charges they have made. Then arises the question whether Mr. *Collier* is right in his contention that stat. 8 & 9 *Vict. c. clv.* entirely overrides the clauses in the former Act, by which the Company were entitled to charge for these goods at their discretion so long as their charges were reasonable. Now, stat. 8 & 9 *Vict. c. clv.*, in my judgment, does not abrogate those provisions in the earlier Act which are not inconsistent with it; and I cannot help thinking that, as regards the power of the Company to charge for the conveyance of goods by their own carriages, the true construction of the two

(a) 7 *Jur. N. S.* 173.

statutes together is this, that stat. 8 & 9 *Vict. c. clv. s. 19.* applies only to goods of a character and description where the charge may be by so much per ton; and the sections of the earlier statute, which relate to smaller goods, still remain unaffected by the later statute; and therefore the Company were justified in imposing on them the charges they did.

The second question under the money count is that relating to the charges for the collection and delivery of parcels forwarded by the plaintiffs by passenger and van trains, under the circumstances detailed in the case. The Court has fully disposed of that question in the course of the argument, and declared its judgment that under this head the plaintiffs are entitled to recover.

The third head on the money count is that which has been mentioned as the question relative to the carriage of certain goods called "*Manchester Packs*," and certain other goods. Of this also we have disposed during the argument, when we pronounced our judgment in favour of the defendants.

With respect to the fourth head of claim under that count, namely, the question arising on the *Bridgewater* traffic. Here it has not been found that any unreasonable inequality was made by the defendants to the detriment of the plaintiffs. This question depends partly on the foregoing one relating to the *Bridgewater* traffic, and partly on stat. 8 & 9 *Vict. c. clv.* The effect of that statute on the former Act we have already considered, and pronounced our judgment. On this head, therefore, the plaintiffs will get the smaller sum found by the arbitrator, namely, 6*l.* 9*s.* 2*d.*

With reference to the fifth claim under the common

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company.

1861.

GARTON
v.
BRISTOL
and
EXETER
Railway
Company

count, the case of *Baxendale v. The Eastern Counties Railway Company* (a) governs that.

The sixth claim under the common count turns chiefly on the same question as the preceding one; it also involves the small parcels question under 6 & 7 *W.* 4. c. xxxvi.; and on it the plaintiffs are entitled to recover 1*l.* 15*s.* 5*d.*, according to the finding of the arbitrator.

The seventh claim under the common count relates to payments made by the plaintiffs in excess of the scale in the defendants' scale bills. Some of these charges were made by mistake, and the point has been given up by their counsel.

There remains a general claim by the plaintiffs to recover the various sums assessed by the arbitrator on the common count, on the ground that the defendants had not put up any boards to indicate the amount of their tolls. It is very doubtful indeed whether they are bound to put up boards at all in respect to the conveyance of parcels and packages by their own carriages; but, at all events, we think that any payments which they received from the plaintiffs or others on this head, cannot be recovered back on a count for money had and received.

CROMPTON, HILL and BLACKBURN Js. concurred.

Judgment accordingly.

(a) 4 *Com. B. N. S.* 63.

1861.

The Board of Guardians of the Poor of the township of TOXTETH PARK, appellants, against
The Local Board of Health of the rural district of TOXTETH PARK, respondents.

Wednesday,
May 1st.

Local Govern-
ment Act, 1858.
General dis-
trict rates.
Test of rate-
ability.
Workhouse.

1. Sect. 55 of The Local Government Act, 1858 (21 & 22 Vict. c. 98.), which provides that the general district rates under the Act shall be levied "upon the occupier of all such kinds of property as by the laws in force for the time being are or may be assessable to any rate for the relief of the poor," has reference to the description of the property, not to the character of its occupation in the particular instance; and makes assessable to the district rates all property which, from its nature, is *prima facie* assessable to poor rate.

2. T., an extra parochial place maintaining its own poor, consisted of two districts; one within the borough of L., the other, "the rural" district, not within L. The guardians of T. built a workhouse and workhouse hospital within the rural district, which were used for the whole, and only for the whole, of T. The Local Board of Health for the rural district having made a general district rate for that district: Held, that the guardians of T. were liable to assessment, as occupiers of property assessable for the relief of the poor, within the meaning of sect. 55 of stat. 21 & 22 Vict. c. 98.

CASE stated under stat. 12 & 13 Vict. c. 45.

Toxteth Park is an extra parochial place, separately maintaining its own poor. Part of it lies within the boundary of the borough of *Liverpool*, and the other part beyond the boundary; and such last mentioned part is called the rural district of *Toxteth Park*.

Toxteth Park, and certain contiguous parishes, were for some time united for the administration of the laws for the relief of the poor, and formed a union for such purposes, called the union of *West Derby*; but in consequence of the increase of the population *Toxteth Park* was, in the year 1857, duly separated from such union; and since that time the laws for the relief of the poor of *Toxteth Park* have been and are administered by the

1861.
Guardians of
TOXTETH
Park
v.
Local Board
of Health of
TOXTETH
Park.

appellants as a separate board of guardians, duly elected under the provisions contained in the 66th section of The Poor Law Amendment Act, 7 & 8 Vict. c. 101.; and the poor rates made in respect of *Toxteth Park* are entire rates extending over the whole of *Toxteth Park* aforesaid.

In consequence of such separation, the board of guardians of *Toxteth Park* purchased a large piece of land situate in the district of *Smithdown Lane* hereinafter mentioned, in the said rural district of *Toxteth Park*, and erected thereon a very extensive workhouse and workhouse hospital for the poor of the whole of the said extra parochial place of *Toxteth Park*; and such land was, before and until the time of such purchase, by the laws in force for the time being, assessable to any rate for the relief of the poor.

Prior to the erection of such workhouse and workhouse hospital, there was no sewer in the said district of *Smithdown Lane*; but, in consequence of the erection of such workhouse and hospital, the respondents, after the passing of The Local Government Act, 1858, commenced and made a sewer, being a work of a permanent nature, under the powers given to them by The Public Health Act, 1848, and The Local Government Act, 1858, for the purpose of draining the said workhouse and workhouse hospital and the dwelling house within the said district of *Smithdown Lane*, and for the benefit thereof; and, at the request of the appellants, the respondents gave permission to the appellants to enter such sewer for the use and benefit of such workhouse and hospital, and the appellants have accordingly entered such sewer, and made drains communicating between the said sewer and workhouse and hospital.

Prior to the passing of The Local Government Act,

1858, the respondents had, under the 88th section of The Public Health Act, 1848, made and levied special district rates.

The said workhouse and workhouse hospital, at the time when the said several rates were made, were in fact assessed to rates for the relief of the poor of the said extra-parochial place of *Toxteth Park*; but whether they were, according to law, assessable to such rates was a part of the question submitted to the Court.

By the 8th section of stat. 9 & 10 *Vict. c. cxxvii.* entitled "An Act for the improvement of the sewerage and drainage, and for the sanitary regulation of the borough of *Liverpool*," &c., after reciting that the powers and provisions of stat. 5 & 6 *Vict. c. cv.*, entitled "An Act for better paving and improving the streets and highways within the extra parochial place of *Toxteth Park*, in the county palatine of *Lancaster*, and for the sewerage of certain parts of the said place, so far as the same related to the construction and repair of, and cleansing the sewers, drains, and watercourses, and other sewerage purposes, and to the raising of money and the imposition of rates for the said last mentioned purposes, were confined to such part of the said extra-parochial place as lies within the boundary of the said borough, and that the powers and provisions of the same Act, as far as the same related to the construction, repair, paving and flagging of the streets, and to the cleansing of the said extra parochial place, and the raising of money and the imposition of rates for the said last mentioned purposes, extended to the whole of the said extra parochial place of *Toxteth Park* which lies as well within as without the said borough; it was enacted, that such and so many of the provisions of the said Act as related to that part of

1861.

Guardians of
Toxteth
Park

v.
Local Board
of Health of
Toxteth
Park.

1861.
 Guardians of
Toxteth
Park
 v.
 Local Board
 of Health of
Toxteth
Park

the extra-parochial place of *Toxteth Park* which lies within the said borough should, on and after the day on which that Act should come into operation, be, and the same were, on and after the said day, thereby repealed.

By the 160th section of the said stat. 9 & 10 *Vict. c.* cxxvii. it is enacted that the said parish of *Liverpool*, and the said several townships of *Everton* and *Kirkdale* respectively, and the said parts of the township of *West Derby*, and of the said extra-parochial place of *Toxteth Park*, respectively, should be separate and distinct districts for the purpose of laying and levying the said several rates therein mentioned.

By the 162nd section of the said stat. 9 & 10 *Vict. c.* cxxvii. it was enacted that money borrowed by the Commissioners, in pursuance of the authority therein mentioned, should be a charge upon the sewer rate, to be made as thereinbefore directed in the said part of the extra-parochial place of *Toxteth Park* which lies within the said borough.

By the provisional order of the General Board of Health, bearing date 30th of *July* 1855, confirmed by stat. 18 & 19 *Vict. c.* 125., being "The Public Health Supplemental Act, 1855," The Public Health Act, 1848, with certain exceptions set forth in that order, was applied to the parts included within the boundaries of *Toxteth Park* aforesaid, as defined in the said stat. 5 & 6 *Vict. c.* cv., and the Commissioners for the time being acting in execution of the said local Act of 5 & 6 *Vict. c.* cv. were appointed the Local Board of Health under the said Public Health Act.

By stat. 21 *Vict. c. x.* it was enacted, "that such provisional order should be taken and held to apply to so much of the said extra parochial place as is not

included within the boundaries of the said borough; and the said order is declared to be of full force and effect within and in respect of so much of the said extra parochial place as is not so included as aforesaid; and all the acts, contracts, instruments and proceedings done, entered into or executed by the Local Board of Health, acting under the said order, should be and were thereby declared to be as valid and effectual as if the said order had referred only to the part of the said extra-parochial place not so included as aforesaid: and the respondents became, and were and are, the Local Board of Health of the rural district aforesaid.

After the erection of the said workhouse and hospital, and such communication had been made by the appellants into the said sewer so made by the respondents, and after the said workhouse had been appropriated, and while it was being used as the workhouse for the said extra-parochial place, that is to say, on 6th March 1860, a general district rate was made and published by the respondents for the district of *Smithdown Lane* aforesaid, for the purposes of paying the expences incurred by the said Local Board of Health in making the said sewer. Such rate was intituled as follows.

“*Smithdown Lane*, General District Rate. *Toxteth Park*, Local Board of Health. Estimate for rate for sewerage purposes on the separate district of *Smithdown Lane*. To pay first annual instalment of principal borrowed from *The Royal Insurance Company*, and interest; to meet which a rate of 9d. in the pound on all property in the said district liable thereto will be required. 60l.

“An assessment for a general district rate for sewerage purposes only, for the district of *Smithdown Lane*, made

1861.

Guardians of
TOXTETH
Park
v.
Local Board
of Health of
TOXTETH
Park.

1861. by the Local Board of Health for the rural district of
 Guardians of *Toxteth Park*, for defraying such expences as are, by
 The Public Health Act 1848 and The Local Government
 Act 1858, charged upon that rate, this 6th day of *March*
 1860, after the rate of 9*d.* in the pound, upon the occu-
 Local Board piers and other parties liable by law to be assessed
 of Health of thereto, to commence and be payable on the 13th day
 of *Toxteth Park* *March* 1860."

[Here followed an extract from the rate book, in which book the appellants were rated as "the *Toxteth Park* guardians," at 1000*l.*, in respect of "a workhouse."]

Afterwards, that is to say, on 6th *June* 1860, a general district rate was made and published by the respondents, intituled "General District Rate."

"An assessment for a general district rate made by the Local Board of Health of the rural district of *Toxteth Park*, for defraying such expences as were by the Public Health Act, 1848, and Local Government Act, 1858, charged upon that rate, this 5th of *June*, 1860, after the rate of 1*s.* 10*d.* in the pound, upon the occupiers and other parties liable by law to be assessed thereto, to commence and be payable on the 12th of *June*, 1860."

[Here followed an extract from the rate book, in which the appellants were rated as above in respect of the workhouse, and in the sum of £200 in respect of a "workhouse hospital."]

The appellants contended that they were not liable to be rated to the said several rates, on the ground that the respondents were only authorized to levy such rates upon such kinds of property as are assessable to poor rates; and that such workhouse and hospital, being situate within *Toxteth Park*, and not being united with

other parishes for the relief of the poor, is not a kind of property assessable to the poor rate, and that the respondents were precluded from levying the several rates in question upon the said workhouse and hospital.

The respondents contended that the said workhouse and hospital were properly assessed to the said several rates, on the ground that the said workhouse and hospital were and are a workhouse and hospital for the whole district of *Toxteth Park*, both within and beyond the boundaries of the said borough of *Liverpool*; and were and are, by the laws in force for the time being, assessable to the rates for the relief of the poor.

And the respondents further contended that, even if the Court should be of opinion that the said workhouse and hospital were not assessable to rates for the relief of the poor, the said workhouse and hospital were assessable to the said rates, or one of them, as the rural district of *Toxteth Park* formed only a portion of *Toxteth Park* aforesaid, for the benefit of the whole of which the said workhouse and hospital were and are erected.

The question for the opinion of the Court was, Whether such workhouse and hospital were properly assessable to the said several rates, or either of them.

Welsby, for the respondents. The workhouse and hospital are both assessable to these rates. Sect. 88 of The Public Health Act, 1848, 11 & 12 *Vict.* c. 68., is repealed by sect. 55 of The Local Government Act, 1858, 21 & 22 *Vict.* c. 98.; but is, in fact, reenacted by the provisions in that section, that "the general district rates shall be made and levied upon the occupier of all such kinds of property as by the laws in force for the time being are or may be assessable to any rate for the relief of the

1861.

Guardians of
Toxteth
Park
v.
Local Board
of Health of
Toxteth
Park.

1861.
 Guardians of
 Toxteth
 Park
 v.
 Local Board
 of Health of
 Toxteth
 Park.

poor, and shall be assessed upon the full net annual value of such property," &c. The effect of that section is, that all property *primâ facie* assessable to the poor rate, under stat. 43 *Eliz. c. 2.*, is to be assessable to the district rates: and the workhouse and workhouse hospital are within that class of property. It is true that a workhouse has sometimes been held to be not rateable to the poor rate; not, however, on the ground of its being a kind of property which was not so rateable, but because the assessment imposed upon the workhouse would, in effect, be paid out of the poor rate, so that the parish would derive no benefit. That was also the ground upon which, in *Rex v. The Commissioners for Lighting Beverley (a)*, the Commissioners were held not rateable to the poor rate in respect of their occupation of their gas works. But that is an objection founded upon the practical consequences of the assessment in the particular instance, where the area for the benefit of which the workhouse or other building is erected is conterminous with the area upon which the assessment is made; and does not affect the general question whether workhouses are *primâ facie* assessable to the poor rate. It is clear, from the authorities, that they are so assessable, and that the occupation of them is not such an occupation for public purposes as brings them within the exemption on that ground. *Regina v. Wallingford Union (b)* and *Governors of the Bristol Poor v. Wait (c)*, are authorities in point. They are both recognised by the Court in its judgment in *Regina v. Justices of Hull (d)*, where a local board of health was held rateable to the poor rate of a parish

(a) 6 *A. & E.* 645.

(b) 10 *A. & E.* 259.

(c) 5 *A. & E.* 1.

(d) 4 *E. & B.* 29.

in respect of a yard partly within that parish, and occupied by the board solely for the purpose of repairing the highways in their district, which included part of such parish. Here, moreover, as in those cases, the area for which the workhouse is used is not conterminous with the area for which the general district rate is imposed; so that there would not be any circuitry in the payment of such district rate. That point, however, does not really arise in the case of an assessment under The Local Government Act, 1858; which, as has already been said, was intended to impose the liability upon all property *primâ facie* rateable to the poor rate. [*Cockburn C. J.* There would be a difficulty here, in making the rate on the district, in determining what was the value of the workhouse and workhouse hospital; inasmuch as part of their value arises from the use of it by places not within the district.] That difficulty would exist in all cases where the areas are not conterminous. But it would not affect the principle of rateability.

Overend, for the appellants. The workhouse and workhouse hospital are not liable to these rates. They are used, not for the benefit of a number of parishes united, but solely for that of the parish in which they are situate; and they are used for public purposes only. They are therefore not assessable. [*Cockburn C. J.* I do not think there is any authority for holding that a workhouse, situate in its own parish, is not *primâ facie* assessable to the poor rate for that parish.] The case comes within the principle laid down in *Rex v. The Commissioners for Lighting Beverley (a)*.

(a) 6 A. & E. 645.

1861.

Guardians of
Toxteth
Park
v.
Local Board
of Health of
Toxteth
Park.

1861.

Guardians of
Toxteth
Park
v.
Local Board
of Health of
Toxteth
Park.

COCKBURN C. J. I am of opinion that the intention of stat. 21 & 22 *Vict. c. 98.* was to make all property which, in its nature, is *primâ facie* assessable to the poor rate, assessable also to the general district rates. This workhouse and workhouse hospital are clearly property of that nature. Even where it is necessary to regard the character of the occupation, it has more than once been held that unless the area for which the workhouse is used is strictly conterminous with the area on which the poor rate is imposed, the workhouse is rateable to the poor rate, there being a beneficial occupation: and I think these decisions are consistent with justice and common sense. But, for the purposes of stat. 21 & 22 *Vict. c. 98.* it is sufficient, as I have already said, that the *kind* of property occupied be such as is, *primâ facie*, assessable to the poor rate. Our judgment must therefore be for the respondents.

CROMPTON J. I am of the same opinion. I think that the words "kinds of property" &c., in sect. 55 of stat. 21 & 22 *Vict. c. 98.*, are intended to refer to such property as would be rateable to the poor rate under stat. 43 *Eliz. c. 2.* The district rates are to be levied upon "the occupier" of all such property. Now the authorities are clear that a workhouse (and a workhouse hospital is, in that respect, the same thing) is *primâ facie* assessable to poor rate. It has been held not assessable in certain cases, where the rate would be circuitous, and taken, as it were, out of one pocket to be put into the other. But that does not affect the question whether or not a workhouse is a kind of property *primâ facie* assessable to the poor rate. As to the

question of the occupation, I take the same view as the Lord Chief Justice.

1861.

Guardians of
Toxteth
Park
v.
Local Board
of Health of
Toxteth
Park.

HILL J. I also am of opinion that judgment should be for the respondents. Sect. 55 of stat. 21 & 22 *Vict. c. 98.* was intended, in my opinion, to apply to the description of property, and not to the nature of the occupation in the particular instance.

BLACKBURN J. I am of the same opinion. The occupiers of a workhouse are occupiers of property assessable to the poor rate, within the meaning of sect. 55 of stat. 21 & 22 *Vict. c. 98.* In some cases, no doubt, a workhouse has been held to be not assessable where the rating would be, to use the expression of *Littledale J.*, in *Rex v. The Commissioners for Lighting Beverley (a)*, as broad as it is long. But that is an objection of a personal nature, so to speak, to the particular rate, when the areas happen to be conterminous. And, as regards the objection that the occupation is for public purposes, that is an objection founded, not upon the *description* of the property, which is the test of rateability under stat. 21 & 22 *Vict. c. 98.*, but on the character of the occupation, which, as has already been said, is not material.

Judgment for the respondents.

(a) 6 A. & E. 645. 650.

1861.

Thursday,
May 2d.

MACKLEY *against* HANNAH PATTENDEN.

*Bankruptcy.
Election by
assignees.
Reasonable
time.*

A party who had deposited a lease for years with the plaintiff as security for a debt, and given him a memorandum by way of equitable mortgage, became bankrupt in 1847, but was allowed to remain in possession and receive the rents until his death in 1858. In 1859 the Court of Bankruptcy, on application of the plaintiff, made an order for the sale of the lease, or, in the event of sale being deemed not advisable, that it should be assigned to the plaintiff. The sum bid for the property being insufficient to satisfy the plaintiff's claim, it was assigned to him in 1860 by the official assignee, and a creditors' assignee appointed in lieu of the original creditors' assignee, who had refused to concur in the sale. In ejectment by the plaintiff against the personal representative of the bankrupt, held:

1. That the assigning the lease to the plaintiff was an acceptance of it by the assignees.
2. That it was a question for the jury whether they had accepted it within a reasonable time.

THIS was an action of ejectment to recover a piece of ground with two messuages thereon. At the trial before *Hill J.*, at the *Middlesex* sittings after *Trinity* Term, 1860, it appeared that in *May*, 1846, a lease of the premises for ninety-nine years, at an annual rent of 10*l.* was made by *B. and R.*, to *Joseph Pattenden*. *Pattenden* became bankrupt in *August*, 1847, and in *July*, 1849, the plaintiff proved his debt. Previous to his bankruptcy, *Pattenden* deposited the lease with the plaintiff as security for a debt, and gave him a memorandum by way of equitable mortgage; but *Pattenden* was allowed to remain in possession, and received the rents until his death, which took place in *February*, 1858; he having made a will a few days previously, whereby he bequeathed this lease to the defendant, who was his wife, and whom he also constituted his sole executrix. In 1859 the Court of Bankruptcy, on the application of the plaintiff, made an order for the sale of the lease, or, in the event

of a sale not being deemed advisable, that it should be assigned to the plaintiff. The sum bid for the property being insufficient to satisfy the plaintiff's claim, it was assigned to him in 1860 by the official assignee, and a creditors' assignee appointed in lieu of the original creditors' assignee, who had refused to concur in the sale.

On this state of facts the defendant's counsel, besides taking some other objections to which it is unnecessary to advert, argued that there was no reasonable evidence of an acceptance of this lease by the assignees. The learned Judge, however, overruled all the objections, and on this particular one reserved leave to move the Court.

A verdict having been given for the plaintiff, *Montagu Chambers*, in *Michaelmas* Term, 1860, obtained a rule nisi to enter a verdict for the defendant, or a nonsuit, on the ground that there was no evidence that the assignees had accepted the lease in due or reasonable time.

Shee Serjt. and *W. T. Barnard*, now shewed cause. The property of a bankrupt does not vest in his assignees until some unequivocal act of acceptance of it by them; *Goodwin v. Noble* (a); and no act of acceptance of a lease can be more unequivocal than selling it. [*Blackburn J.* referred to *Hastings v. Wilson* (b)]. The point that the acceptance of the assignees should be within a reasonable time was not made at the trial; and if it had, further evidence in proof of that fact would have been adduced by the plaintiff. Assignees of a bankrupt have a right to elect, whenever they please, whether they will accept property

1861.

MACKLEY
V.
PATTENDEN.

(a) 8 E. & B. 587.

(b) *Holt. N. P. C.* 290.

1861. belonging to the bankrupt ; and when they have done
 so the property vests in them ; note to *Auriol v. Mills*,
 1 *Smith. L. C.* 681, (4th ed.), and the cases there cited
 of *Copeland v. Stephens*, 1 *B. & Ald.* 593, *Ringer v. Cann*,
 3 *M. & W.* 348. The object of the bankrupt law was
 to render the estate of the bankrupt available for the
 benefit of his creditors, and it is for the assignees to
 judge whether any given property will be a burden or
 an advantage. A property which would be a burden at
 one moment may become beneficial in course of time.
 The Bankrupt Law Consolidation Act, 12 & 13 *Vict.*
c. 106. *s.* 145., enacts, " If the assignees of the estate
 and effects of any bankrupt having or being entitled
 to any land either under a conveyance to him in
 fee or under an agreement for any such conveyance,
 subject to any perpetual yearly rent reserved by such
 conveyance or agreement, or having or being entitled to
 any lease or agreement for a lease, shall elect to take
 such land or the benefit of such conveyance or agree-
 ment, or such lease or agreement for a lease, as the case
 may be, the bankrupt shall not be liable to pay any rent
 accruing after the issuing of the fiat or filing of the
 petition for adjudication of bankruptcy against him, or
 to be sued in respect of any subsequent non-observance
 or non-performance of the conditions, covenants, or
 agreements in any such conveyance or agreement, or
 lease or agreement for a lease ; and if the assignees shall
 decline to take such land, &c., the bankrupt shall not be
 liable if, within fourteen days after he shall have had
 notice that the assignees have declined, he shall deliver
 up such conveyance, &c., to the person then entitled to
 the rent, or having so agreed to convey or lease, as the
 case may be ; and if the assignees shall not (upon being

thereto required) elect whether they will accept or decline such land &c., any person entitled to such rent, or having so conveyed &c., or any person claiming under him, shall be entitled to apply to the Court, and the Court may order them to elect and deliver up such conveyance &c., in case they shall decline the same, and the possession of the premises, or may make such other order therein as it shall think fit." [*Crompton J. Lawrence v. Knowles* (a) is an authority that assignees are bound to make their election within a reasonable time. *Cockburn C. J. Hanson v. Stevenson* (b) is to the same effect.] Those cases were decided under the old bankrupt Acts. [*Cockburn C. J. In Graham v. The Van Diemen's Land Company*, in the Exchequer Chamber (c), *Maule J.* said, "It seems to us that it would be proper to tell the jury that there is no limit of time until some one makes an application." "We think that in cases of this kind a reasonable time will not begin to run until some one interested in the matter takes some step in respect of it." The rest of the Court, however, do not appear to have concurred in that opinion; and my brother *Crompton* tells me that they did not agree in it.]

1861.

MACKLEY
v.
PATTERDEN.

M. Chambers, Stammers and Philbrick, in support of the rule. The merely advertising a lease for sale is not an acceptance of it by the assignees of a bankrupt; *Turner v. Richardson* (d). There must be a positive taking possession so as to render them liable for the rent and covenants; *Bourdillon v. Dalton* (e). [*Hill J.* How could they do so here, where the lease was subject

(a) 5 Bing. N. C. 399.

(b) 1 B. & Ald. 303.

(c) 11 Exch. 101.

(d) 7 East, 335.

(e) 1 Peake N. P. C. 238.

1861.

MACKLEY
 v.
PATTENDEN.

to an equitable mortgage? They did all they could, namely, apply to the Court for an order to sell on the application of the equitable mortgagee.] But, at all events, the assignees ought to have accepted the lease within a reasonable time; *Taylor v. Young* (a). Stat. 12 & 13 Vict. c. 106. does not apply here, as it was not in force at the time of this bankruptcy; but, if it does, it has a clause (sect. 188) requiring the assignees to wind up at the end of two years; and neither under that nor the old statutes could the bankrupt call on the assignees to elect to take a lease, that being the exclusive privilege of the lessor; *Ex parte Vardy* (b). Whether the time taken to elect was reasonable is matter of law to be determined by the Court; and in the case of *Graham v. The Van Diemen's Land Company* (c), already cited, *Cresswell J.*, during the argument, says, with reference to the question of reasonable time, "It may be an ingredient, in considering that question, to see whether the situation of either party has been altered in the meantime." If the time for election were indefinite, great difficulties would arise with respect to the Statute of Limitations in actions against bankrupts; and if a bankrupt, who is allowed to remain in possession for many years, were to improve the property, it would be at the expence of the new creditors, seeing that the old assignees might still come and take it. [They also cited the observations of *Williams J.* in *Beckham v. Drake* (d).]

COCKBURN C. J. This rule must be made absolute; not, however, in either of the forms in which it is asked for—namely to enter a verdict for the defendant, or for

(a) 3 B. & Ald. 521.

(b) 3 Mont. D. & D. G. 340.

(c) 11 Exch. 111.

(d) 2 H. L. Ca. 596.

a nonsuit—but for a new trial, on the ground that there has been a miscarriage in the way that the case went to the jury. The question as to whether the assignees of the bankrupt had elected to take this lease depends on whether, prior to their doing what they did, they had or had not declined to interfere, under such circumstances as to divest themselves of authority to act as they have done. And that must depend on whether the lapse of time between the bankruptcy and the conveyance to the plaintiff was so unreasonably long that, taken in conjunction with the surrounding circumstances of the case, the jury would be warranted in coming to the conclusion that the assignees had declined to accept the lease. Now it appears that that question was not raised at the trial. On the points submitted to the Judge at the trial, I think his ruling and direction perfectly right; but it must be assumed that, if the point I have mentioned had been presented to him, he would have left it to the jury, accompanied with all necessary observations; in which event it is possible that they might have found adversely to the plaintiff. I do not say that such would, but merely that such might, have been the result. There has, therefore, been a miscarriage of justice in this case; still, inasmuch as that miscarriage was not occasioned by any fault of the Judge, who had not this question submitted to him, and did not know that it was one which either of the parties desired should be raised, but the fault of those who represented those parties, the new trial should be on payment of costs; and on the further condition that the costs be paid within a reasonable time, i. e., between this and the first day of next term.

1861.

MACKLEY
v.
PATTENDEN.

CROMPTON J. I am of the same opinion. I do not

VOL. I.

O

E. B. & S.

1861.

MACKLEY
v.
PATTERDEN.

agree in the argument that a man cannot pass a property without formally accepting it. So soon as he takes up his pen to transfer the property, that is equivalent to an acceptance, and it passes out of him. Is there any thing, then, from whence we can conclude that the practice in the Bankruptcy Court is at variance with this? Long before the present statute it was the law that assignees are to judge whether or not they will take a lease which may turn out an onerous burden. My notion is that the present case should go to another jury; although I am not quite clear whether the question to be presented to them should be whether the acceptance of this lease by the assignees was within a reasonable time from the bankruptcy, or whether they had declined to accept it within that time. Looking at the cases, I think it should be the former; for the lease is in the bankrupt until accepted by the assignees, and that must be done within a reasonable time. I think the Judge at the trial was right in his rulings on the points raised; but this was a new point, depending on the question, Did the assignees accept the lease within a reasonable time? There may be ground for saying that the assignees took an unreasonable time under the circumstances; still they may have been taking time to see what the equitable mortgagee was doing.

HILL and BLACKBURN Js. concurred (a).

Rule absolute accordingly.

(a) It should be observed that the bankruptcy in this case was previous to the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106. In a recent case of *Cartwright v. Glover*, 2 Giffard, 620, Vice Chancellor *Stuart* held that, under stat. 12 & 13 Vict. c. 106, s. 145, the interest of a bankrupt in leasehold property remains in his assignees until they elect *not* to take the demise, and that *Copeland v. Stephens*, 1 B. & Ald. 593 (cited in the text), which was decided under the old law has no application where, by virtue of that act, the bankrupt's estate vests in the assignees.

1861.

TAMVACO and others *against* LUCAS and others.Saturday,
May 4th.

Defendants had become responsible, as del credere agents, for the purchase of a cargo of wheat of from 1800 to 2000 quarters, to be shipped at the price of 50s. per quarter free on board at *Taganrog*, "and including freight and insurance to any safe port in the United Kingdom." "Payment cash in *London* in exchange for shipping documents." Plaintiffs tendered the following shipping documents of a cargo answering the description in the contract: a charterparty; a bill of lading and provisional invoice, in both of which the cargo was stated to be 1850 quarters, at 50s. per quarter, 4626*l.*, less freight, at 10s. 9*d.* per quarter, 1001*l.* 10s.; and a policy of insurance effected on the cargo valued at 3600*l.* On behalf of the plaintiffs evidence was given, which was not contradicted, that the policy tendered was sufficient to protect the interest of the shipper of the cargo at the time of shipment. In an action against the defendants for not paying or procuring from their principal payment of the price of the cargo, they pleaded that plaintiffs were not ready and willing to tender, nor did they tender, "the usual shipping documents" according to the contract. Held, that the plaintiffs had so tendered: and they were not bound to tender, as a "shipping document," within the meaning of the contract, a policy covering the full amount of the buyers' risk as it appeared by the provisional invoice and bill of lading.

*Vendor and vendee.
Construction of contract.
"Payment in exchange for shipping documents."*

THE first count of the declaration stated that plaintiffs employed defendants, as their del credere agents and brokers, to make a contract for them, and the defendants did make a contract for plaintiffs in the words and figures following:—

"London, August 25, 1857.

"Sold to our principal, on account of Messrs. *Tamvaco, Micrulachi and Mavrogordato*" (the plaintiffs) "a cargo of *Taganrog Ghirka* wheat, of a fair average quality, of the season's shipments, at time of loading, consisting of about 2000 quarters (say from eighteen hundred to two thousand quarters), at the price of 50s. (say fifty shillings) per delivered quarter of 492 lbs., free on board at *Taganrog*, and including freight and insurance to any safe port in the United Kingdom,

1861. calling for orders as usual; the wheat to be shipped
 TAMVACO from the 1st *October* to the 15th *November*, new style,
 v. in an A 1 *English*, or a first class foreign vessel, not
 LUCAS. *Greek* nor *Turk*; the vessel is to suffer no detention
 from ice. The measure, for the sake of invoice, to be
 calculated at the rate of 100 chetwerts equal to 72 quar-
 ters. Sellers guarantee delivery of invoice weight, sea
 accidents excepted. Buyers to pay for any excess of
 weight, unless it be the result of sea damage or heating.
 Payment, cash in *London* in exchange for shipping
 documents (so soon as the vessel has got out of the *Sea*
of Azoff), less discount at the rate of 5*l.* per cent. per
 annum, for the unexpired portion of three months from
 date of bill of lading. Sellers guarantee to buyer a
 reasonable number of lay days for discharging; com-
 mission 2½ per cent., to be paid by sellers."

"*S. H. Lucas & Sons.*"

The count then stated that plaintiffs were the persons designated in the contract as the sellers, and that the contract in the said note was made by defendants between plaintiffs and one *T. H. Dart*, who was then the principal of defendants, and who is designated by them "the buyer." That defendants were employed by plaintiffs to make, and did make, this contract, on terms, amongst others, that defendants, for certain commission payable to them by plaintiffs, should be del credere agents, and should be responsible to plaintiffs for the solvency of, and performance of the contract by, defendants' unnamed principal, the buyer, with whom the contract was made by them on account of the plaintiffs, for the payment of the price of the cargo, according to the terms of the contract. That, after the making of the contract, *T. H. Dart* was

declared by defendants to be their principal in the contract; and afterwards and in due time, according to the contract, plaintiffs were ready and willing, and offered to deliver to defendants, who then were agents to *Dart* in that behalf, and to *Dart*, the usual shipping documents, according to the contract, of a cargo of wheat, such and so shipped as was stipulated for in the contract, in exchange for the invoice price, according to the contract. That all conditions precedent to plaintiffs' right to have the shipping documents accepted and paid for by *Dart*, according to the contract, were performed and fulfilled, and all things happened necessary to entitle them to be paid by *Dart*, of which defendants had notice. That *Dart* stopped payment and became insolvent, and had not accepted the documents nor paid plaintiffs for the cargo. Averment: that all conditions precedent to plaintiffs' right to hold defendants responsible for the solvency of, and performance of the contract by, their principal, and to hold defendants responsible for the payment of the price according to the contract, and to maintain this action for the breach after mentioned, have been performed and fulfilled. Breach: That defendants have not nor would perform the contract, nor procure the same to be performed by *Dart*; nor have they paid, nor would they pay nor be responsible for, the payment of the price of the cargo according to the terms of the contract; nor have they paid, nor would they pay nor be responsible to plaintiffs for, the loss which they have sustained by the nonpayment of the price and non-fulfilment of the contract by *Dart*, and by his insolvency.

Third plea. That plaintiffs were not ready and willing to deliver, nor did they offer to deliver, to

1861.

TAMPAOO
v.
LUCAS.

1861.

TAMVACO

v.

LUCAS.

plaintiffs or to *Dart*, the usual shipping documents according to the contract, of a cargo of wheat, such and so shipped as was stipulated in the contract, in exchange for the invoice price, according to the said contract. Issue thereon.

At the trial, before *Cockburn C. J.*, at the *London* Sittings after last *Trinity* Term, it appeared that the defendants were corn factors in *London*, and that, on 25th *August* 1857, defendants, acting for the plaintiffs on a *del credere* commission at $2\frac{1}{2}$ per cent., signed and delivered to the plaintiffs the following contract note.

“ *London*, 25th *August* 1857.

“ Sold to our principal, on account of Messrs. *Tamvaco*, *Micrulachi* and *Mavrogordato*, a cargo of *Taganrog Ghirka* wheat of fair average quality, of the season's shipments, at time of loading, consisting of about 2000 quarters (say from eighteen hundred to two thousand two hundred quarters), at the price of 50s. (say fifty shillings) per delivered quarter of 492 lbs., free on board at *Taganrog*, and including freight and insurance to any safe port in the United Kingdom, calling for orders as usual. The wheat is to be shipped from the 1st *October* to the 15th *November*, new style, in an A 1 *English*, or a first class foreign vessel, not *Greek* or *Turk*. The vessel is to suffer no detention from ice. The measure, for the sake of invoice, to be calculated at the rate of 100 chetwerts to 72 quarters. Sellers guarantee delivery of invoice weight, sea accidents excepted. Buyers to pay for any excess of weight, unless it be the result of sea damage or heating; payment in *London*, in exchange for shipping documents (so soon as the vessel has got out of the *Sea of Azoff*), less discount, at the rate of 5*l*. per cent. per annum, for the unexpired portion of three months from the

date of the bill of lading. Sellers guarantee to buyer a reasonable number of lay days for discharging ; commission $2\frac{1}{2}$ per cent., to be paid by sellers."

(Signed) "*S. H. Lucas & Sons.*"

1861.

TAMVACO
v.
LUCAS.

One *Dart* was declared by the defendants to be the principal (as the buyer) in the transaction ; but, on 27th *August*, the defendants were informed that *Dart* repudiated the contract, on the ground that the defendants had exceeded their authority. It was proved by the correspondence between *Dart* and the defendants that they had acted within their authority. Notice of *Dart's* repudiation was immediately given to the plaintiffs. The plaintiffs, however, obtained in the market a cargo afloat that accorded with this contract ; and, on 14th *December* 1857, tendered to the defendants a provisional invoice, together with the charter party, bill of lading and policy of insurance, as the shipping documents. The bill of lading was as follows.

"Shipped in very good condition and order, by Messrs. *George L. Ziffo*, for account and risk of whomsoever it may concern, in and upon the good ship called *The Alice Gill*, *English* flag, whereof is master for this present voyage *John Daniell*, and bound for *Queenstown* or *Falmouth* for orders, chetwerts 2570 (say two thousand five hundred and seventy chetwerts) of wheat, *Ghirka* in bulk, weighing pounds 25,700 ; mats 529 (say five hundred and twenty-nine mats) for dunnage, marked and numbered as in margin, and are to be delivered in the like good order and well conditioned at a safe port of discharge, as per charter party, unto Messrs. *Ziffo, Sons & Co.*, of *London*, or to their assigns ; paying freight, gratuity and demurrage (if any) for the said goods, and all other clauses as per charter party, with primage and average accustomed. Dated in

1861. *Taganrog*, the 24th of *October* 1857, quantity and quality not known."

TAMVACO
v.
LUCAS.

(Signed) "*John Daniell*, Master."

Indorsed by *Ziffo, Sons & Co.*, and the plaintiffs.

The charter party of 12th *August*, 1857, was for a cargo of tallow, wheat, seed or other grain, from *Taganrog* to a safe port in the United Kingdom, at 70s. per ton for tallow, and seed or grain in the customary proportions, according to the *London Baltic* printed rules. Freight to be paid on delivery, half in cash, and half in bills at three months, or in cash with five per cent. discount. Cash for ship's disbursements at port of loading to be advanced, free of interest, to the amount of 150*l.*, to be deducted from the freight, with cost of insurance thereon.

The provisional invoice was as follows.

" *London*, 14th *December*, 1857.

" Messrs. *H. S. Lucas & Sons*,

" To *Tamvaco, Micrulachi*, and *Mavrogordato*, cargo of *Taganrog Ghirka* wheat, shipped per *Alice Gill*, Captain *John Daniell*, from *Taganrog*, consisting of 2500 chetwerts, as per bill of lading, dated *Taganrog*, 24th of *October*, 1857 (O. S.), against contract of 25th of *August* last, 5th of *November*, 1857 (N. S.).

2570 chetwerts, at 100 = 72 qrs.,

= qrs. 1850 $\frac{40}{100}$ at C. F. & I.

per qr., 50s. £4626 0

Less freight at 70s. per ton for

tallow is for wheat 10s. 9 $\frac{1}{2}$ d.

per qr. in full delivered £1001 10

Less advance to Captain at *Ta-* 160 0

ganrog..... ——— 841 10

£3784 10 "

The policy of insurance, dated 5th *December* 1857, was on 2570 chetwerts of wheat, valued at 3600*l*.

On 14th *December*, when the documents were tendered to the defendants, the price of wheat had fallen considerably. The defendants returned the documents, as it was alleged, without having inspected them, and informed the plaintiffs that they would notify the tender to *Dart*. No objection was made by the defendants to any of the documents.

When the ship was reported, on 24th *January*, 1858, the plaintiffs again offered to deliver the shipping documents, and notified that they would hold the defendants responsible. The defendants denied that they were del credere agents, and referred the plaintiffs to the defendants' attorneys.

The defendants contended, at the trial, that they were not del credere agents, and that the tender of the shipping documents was bad on the ground that the policy of insurance did not cover the whole of the buyers' risk, as it appeared from the provisional invoice and bill of lading. Evidence was given on the part of the plaintiffs that the cargo actually yielded only 1809 quarters, and that the policy sufficiently covered the shippers' risk. No evidence in contradiction was offered on behalf of the defendants; nor was it shewn that there was any usage among mercantile men that the policy should cover the buyers' risk. The defendants also contended that the measure of damages was to be ascertained at the time when *Dart* repudiated the contract, when the fall in price was comparatively trifling, and not when the documents were tendered.

The jury returned a verdict for the plaintiffs on the issues raised by the third plea, leave being reserved to

1861.

TANVACO

v.

LUCAS.

1861. the defendants to move to enter it for them : and the
Court was also to say on what principle the damages
were to be assessed.

TAMVACO
v.
LUCAS.

Bovill, in last *Michaelmas* Term, obtained a rule *Nisi* accordingly.

Montague Smith and *Watkin Williams* now shewed cause. The defendants must satisfy the Court that, as a matter of law, the policy tendered was not "a shipping document" within the meaning of the contract. It is said, on behalf of the defendants, that the policy to be tendered must be one effected with reference to the buyers' risk ; and that it will not suffice that it should be an adequate protection to the shippers. But the plaintiffs did not bind themselves to ship a cargo for the defendants. The contract was one which the plaintiffs might fulfil by obtaining in the market a cargo afloat answering to the description in the contract, and tendering the proper shipping documents of such a cargo. It was clear, at the trial, that the policy effected did, in point of fact, cover the shippers' risk : the actual yield of the cargo was only 1809 quarters, and the market had fallen considerably between the time of the shipment and the tender of the documents. Assuming, however, that the policy must cover the risk disclosed by the provisional invoice and bill of lading, the policy here was sufficient. The policy need not cover the freight, which was not payable except on the safe arrival of the cargo, and was never at the buyers' risk. Here the sum of 160*l.* had been advanced at *Taganrog* on account of freight ; but that circumstance does not alter the character of the payment : it is still part of the freight, and would be properly insurable as such by the

shipowner; *Hall v. Janson* (a). If the whole freight, viz. 100*l.* 10*s.*, be deducted from the gross amount of invoice price, there would remain 24*l.* 10*s.* which the policy did not cover. But even this sum may be disposed of under the circumstances: for, by the terms of the contract, the payment was to be made less discount at 5*l.* per cent. for the unexpired portion of three months from the date of the bill of lading. This was the 24th of *October*, old style; that is, the 5th of *November*. The tender of the documents was made on the 14th of *December*, 1857: this would leave fifty-six days' discount, the amount of which would be 27*l.* 16*s.*; and, deducting this further sum from the contract price, there would be a slight margin in the plaintiffs' favour. Lastly, inasmuch as the defendants did not rest their refusal to fulfil the contract on the insufficiency of the policy, they have waived that objection. The plaintiffs might have effected a supplemental policy and tendered it in sufficient time.

(Upon the question of the measure of damages they were stopped by the Court.)

Bovill and *Honyman*, contra. There is no averment of waiver in the declaration. [*Cockburn* C. J. That is not the point reserved.] The policy should have protected the buyer completely, and should therefore have covered the whole amount mentioned in the provisional invoice. The defendants would not be bound to accept the tender of an invoice of a cargo in excess of the limit of the contract, although the cargo actually on board was within the limit; *Tamvaco v. Lucas* (b). The policy tendered should correspond with the invoice:

(a) 4 E. & B. 500.

(b) 1 E. & E. 581.

1861.

TAMVACO
v.
LUCAS.

1861.

TAMVACO

v.

LUCAS.

it will not suffice that it covers what turns out to be the actual risk, if it leave unprotected the risk apparent at the time of tender. Then, it is said that the freight must be deducted in ascertaining the amount for which the policy should be effected. But, if the ship were lost, the buyer would lose the amount of the contract price, viz. 50s. per quarter ; and this risk should be protected. [*Blackburn J.* Surely the invariable usage in calculating the amount to be paid against shipping documents is to deduct the freight.] If the cargo were to arrive, although it were so damaged as to be worthless, the freight must nevertheless be paid : the buyer, therefore, is at some risk, against which he should be protected. The policy here was not made with reference to the contract between the parties, although, in point of fact, it was effected only on the 5th *December*, a few days before the tender. But supposing that the freight may be deducted from the amount for which the policy should be effected, as is contended by the plaintiffs, still there remains a sum of 24*l.* 10*s.* unprotected. The question is one of principle : the amount of the deficiency cannot affect the rule.

Then, as to the waiver : the defendants were not aware of the objection at the time they returned the shipping documents, and were entitled to avail themselves of it when it came to their knowledge.

As to the damages : they should be calculated at the time when *Dart* repudiated the contract. [*Blackburn J.* No. *Esposito v. Bowden* (a) decides that a repudiation of a contract before the time for fulfilment can be treated as a breach only at the option of the other contracting party.]

(a) 4 *E. & B.* 963.

COCKBURN C. J. I am of opinion that the rule for entering a verdict for the defendants must be discharged. The case is presented to us in this shape. It is admitted that the defendants are liable, having received commission which makes them responsible as *del credere* agents, if the buyers of this cargo of wheat were bound to accept the shipping documents tendered, and to fulfil the contract by payment. But it is said that there was a defect in one of the shipping documents, viz. the policy of insurance, in consequence of it not being for an amount sufficient to afford the buyers of the cargo such an indemnity against the loss of the cargo as they were entitled to. The question is put as one of pure law, on these very simple and short facts. The terms of the contract being that the payment should take place on the production of the shipping documents, and when the cargo would still be at sea, a provisional invoice was sent in to the defendants, or rather to the buyers of the cargo, which invoice, framed upon the bill of lading, stated the quantity of wheat at a given amount; but the cargo did not realize that amount, for it turned out considerably less. When the policy of insurance is produced, it turns out to be of less amount than the sum at which the total value of the cargo appeared in the provisional invoice and the bill of lading; and it is said that the buyers would be entitled to take advantage of that circumstance, and to refuse to accept the shipping documents, or to pay according to the terms of the contract; inasmuch as the policy of insurance was included in the shipping documents, on the delivery of which payment was to be made, and the policy of insurance was not sufficient to satisfy the provisions of the contract, being of less amount than the value of the cargo as

1861.

TAMVACO
v.
LUCAS.

1861. represented in the provisional invoice. The total value of the cargo, as appearing on the provisional invoice, included the amount of 1001*l.* 10*s.* for freight; and it is said, on the part of the plaintiffs, that at all events the insurance was not to cover the freight, but only the value of the cargo, as compounded of the cost of the cargo at the place of shipment, the shipping of it, and the commission and other charges which would be incidental to the shipping of such a cargo, and also the premiums of insurance; and that, if the sum of 1001*l.* 10*s.* be therefore deducted, as it ought to be, from the price as per invoice, there would remain uncovered by the policy the comparatively insignificant sum of 24*l.* 10*s.* The first question is whether that is a correct view of the matter, and whether the freight ought to be deducted, as not meant to be included in the policy of insurance and covered by it. I think that is the correct view; and, when we are dealing with a policy of insurance as one of the shipping documents to be delivered by the seller to the buyer in order to protect the buyer, I am of opinion that the freight, which the buyer will not have to pay until the cargo has arrived, need not be covered by the policy of insurance.

There still remains, however, when the freight has been deducted, a sum of 24*l.* 10*s.* unprotected by the policy. Mr. *Smith* has argued that a further deduction should be made on the score of discount. In that view I cannot concur, because I think the true period of payment is that fixed by the terms of the contract, and that the discount is only matter of subordinate and independent arrangement between the parties, whereby, in consideration of a more speedy payment by the one party than that which the contract would in strictness require, the

other party agrees to make an abatement of a portion of the purchase money. I do not think, therefore, that that touches the difficulty in the case.

Then comes the question, whether the deficiency of 24l. 10s. is a matter which could fairly be objected to on the delivery of such a shipping document as this. On this part of the case, as it is presented to us, I think our decision ought to be in favour of the plaintiffs. The contract provides for payment by the buyers on the delivery of the shipping documents. By that I understand the ordinary and usual shipping documents, as they are understood in contracts of this nature by members of the mercantile community. The policy of insurance is undoubtedly one of these; and, if the policy, instead of being such as is contemplated as an ordinary and usual shipping document, turns out substantially a defective one, and such as would not afford the buyer a reasonable protection and indemnity against risk, which he is entitled to under the terms of such a contract, and the shipping documents be accordingly rejected, and the performance of the contract resisted on that ground, I am far from saying that such ground would not be sufficient to justify a buyer in refusing to fulfil the terms of the contract of purchase and sale. But it becomes a very different question whether the present small and comparatively insignificant deficiency may be made a mere pretext for a departure from the contract, when substantial and bonâ fide protection is afforded to the buyers by means of the policy.

The defendants submit the question on this part of the case for our consideration, as a mere question of law on this short point. The policy, when produced, turns out to be somewhat less in amount than what appears

1861.

TAMVAOO
V.
LUCAS.

1861.

TAMVACO
v.
LUCAS.

on the provisional invoice to be the value of the cargo ; and it is said that, on that mere simple fact, without more, as a matter of law, the defendants are entitled to say that the buyers were not bound to perform their part of the contract ; and that therefore the defendants, who have insured the performance of the contract by their principals, are not bound either. I cannot concur in that proposition taken as a matter of law. As I have before said, there may be facts in any particular case which would justify a buyer in refusing to accept a policy of insurance as one of the shipping documents, if the policy of insurance was substantially inoperative to protect the buyer against the possibility of loss or damage by perils of the sea ; but no such question was here submitted as a matter of fact for the consideration of the jury. It was not proposed that it should be submitted to the jury, whether, in the present instance, the policy of insurance was substantially effective as a shipping document, as satisfying that which the buyers had reasonably a right to expect. The question is submitted to us as a mere question of law on the facts as they appear to us on evidence ; and, as I have said, I cannot come to a conclusion that the defendants' contention is correct. If the objection could avail them anything, it would only be on the ground that this was not a compliance with the terms of the contract, reference being had to all circumstances of the case, and to how far this policy of insurance was, substantially and practically, a protection to the buyer against sea risk. The defendants not having asked to have the question left to the jury, we must take it, as against them, that this was substantially a good policy of insurance, and one which would have satisfied the

exigencies of this contract, as being a shipping document on the production and the delivery of which the buyers would have been bound to pay.

1861.

TAMVACO
v.
LUCAS.

There seems to be another view of this case which is also unfavourable to the defendants. Assuming that, upon a contract of this sort, the shipping documents must be substantially sufficient, yet, as this is a term in the contract introduced for the benefit of the buyer, it certainly is one that may be waived by him. In the present case, it does not appear that the buyer ever repudiated this contract, or denied his liability to be bound by its terms, on the ground that these documents or any of them were insufficient. Long before the shipping documents arrived in this country the buyer repudiated his liability, on the ground that the defendants had exceeded their authority as agents. And, again, when the shipping documents arrived, and it was sought to make the buyers fulfil the terms of the contract, the defendants never for a moment set up the insufficiency of these shipping documents; but they sought to force the contract on the buyers for whom they had acted, as one which the buyers were bound to complete. Now, as has been pointed out by more than one of my learned brothers in the course of the argument, if, at the time these shipping documents were originally tendered, there had been any objection taken on the score of the insufficiency of this policy, there would have been no difficulty (for this was long before the arrival of the cargo) in making good the defect by means of supplementary insurance. I think, therefore, there has been a waiver on the part of the buyers, the principals in the contract, and also a waiver on the part of the defendants, who, as agents, were liable on this *del credere* contract.

1861.

TAMVACO
v.
LUCAS.

There was an absolute and entire waiver of any objection which might by possibility have been taken to the insufficiency of the policy. On every ground, therefore, and in every point of view in which I can look at the case, I cannot but think that the defendants have failed to make out, on this technical objection, any ground why the verdict should be disturbed.

CROMPTON J. I am of the same opinion. The point comes before us on a rule to enter a verdict for the defendants on an objection taken at the trial; and I understand that objection to be, that the plaintiffs undertook to insure the defendants as to their interest with reference to the contract price, and with reference to the apparent interest of the buyer under the contract. I do not think that, in point of law, that is so. There was some evidence in the case that the policy was one which would be sufficient as a policy on the shipment; and probably the jury would have found in the affirmative, if that point had been left to them. Therefore, I think the defendants must be confined strictly to the objection which is made the ground of their rule, and which really comes to this: "You undertook to insure my interest in the cargo with reference to this contract price; that is, to insure my interest to the extent of 50s. per quarter." Now, the validity of that objection depends on the nature of the contract. This is not a contract, as I understand it, for the seller to ship free on board a particular ship to be found by the vendee; but it is one of the usual contracts to sell a cargo which is to come by a ship sailing at a particular time, and is covered by the usual policy that would be taken in such a case. I do not think the construction of the contract is that these

parties engaged to ship the cargo: if it had been to be shipped by these particular parties other questions might arise; and, as Mr. *Honyman* put it, it might be an ingredient, if the contract had been so worded, that they should ship and insure in accordance with their knowledge that the value to the buyer was this precise amount. I doubt very much whether that would be so; but, in the present case, I am of opinion that the plaintiffs were at liberty to buy a cargo in the market of any wheat corresponding with that mentioned in the contract, which should be shipped from the 1st of *October* to the 15th of *November*, not in any particular ship, but in any ship answering the description "A 1 *English* or a first class foreign vessel, not *Greek* or *Turk*." Therefore I think it is clear that the present case is one of those in which a person is bargaining for a cargo which shall answer the description on its shipment, or which shall answer the description on the seller ordering it to be shipped in a particular manner, or by buying a shipment which is already at sea. That being the contract, we must see how this supposed obligation to insure to the extent of the interest of the parties on that contract, that is, to the amount of the contract price, including the freight, can arise. Now, I think it very true that this contract is for a shipment which shall be insured, because the price is to be 50s. "including freight and insurance;" it must, therefore, be a cargo by a ship which is bringing goods on freight, and there must be a bill of lading, there must be the charter party, and there must be a policy of insurance; and the question is, what is the meaning of that word "insurance," coupled with the phrase "cash in *London* in exchange for shipping documents"? I do not think that, on this con-

1861.

TANVACO
v.
LUCAS.

1861.

TAMVACO

V.
LUCAS.

tract, the seller himself was bound to insure. I think it is one of those contracts in which the insurance "runs," as it has been expressed, as the bill of lading, and the charter party runs, with the interest in the cargo, as one of the three shipping documents; and I think that, if the original shipper had insured, which he ought to have done, or, if the person who knew of the shipments had insured in *London*, in either of those cases the policy so effected would be the one to which such a contract as this would refer. I think that appears unanswerably to be the true view, when we consider that these documents go along with the property, into whosoever hands it may come. The object is to have these kinds of cargoes saleable in the market; and that, although the cargo has not arrived, the owner may realize his money, and the cargo be sold over and over again before it comes to this country. It seems to me a monstrous thing to say, with reference to every contract of sale of this description, that there must be a policy to cover the full price. The phrase "shipping documents," I think, shews that the policy connected with the shipping and effected at that time would be the document meant. I do not mean to say that if, by any accident, there were no insurance when the cargo was shipped, the contract might not be answered by making a policy in *London*; but I think the contract contemplates a policy made with reference to the shipment. I quite agree with what my Lord has said, that the policy must be a *bonâ fide* policy. I take it that, if there was an illusory insurance, that would not do; because the contract is for a price covering freight and insurance. It appears to me, as I said before, to contemplate, not only that the cargo shall come on freight, but that it shall come in

one of the particular class of ships named, and be insured ; and therefore if there was an illusory insurance I think the buyer might say, " You have not sent it insured." I think, therefore, the terms of the contract relate to the policy on the shipment ; that the insurance must cover the value of the goods, and the cost of the insurance, as at the port of loading ; but that it need not include the freight or profit at the port of discharge. The buyer buys what the seller sells, and puts himself, in effect, in his shoes. I think the first man, if he buys from the original shipper, puts himself in his shoes, as it were, and takes the policy from him—supposing the policy is a right policy with regard to the first shipper,—and whether it be or not is not determined by the value which the buyer thinks the goods will bear when they come to *England*. That being so, the only question is one of fact. Is this a document fairly to be taken as a shipping document, accompanying the rest of the papers, and a fair *bonâ fide* policy ? No point was made as to that at the trial. There was some evidence on which the jury might have so found ; but, no point having been made of it, I think we should be doing wrong if we were to send the case down for a new trial on account of any doubt of that kind, the objection at the trial being merely that the plaintiffs ought to have calculated the amount of insurance so as to cover the cost of 50*s*. I think that justice was done in this case, and that the point of law on which the defendants insist is against them. The rule must therefore be discharged.

HILL J. I am of the same opinion. There is but one narrow question before the Court ; and that is, Whether the policy of insurance tendered was a shipping

1861.

TAMVACCO

V.
LUCAS.

1861.

TAMVAOO
V.
LUCAS.

document sufficient to satisfy the requirements of this contract. The rule was obtained on the ground that the amount of the insurance in the policy was not sufficient : so that we are asked to conclude, as a matter of law, on the simple objection of insufficiency, that the policy was not a shipping document within the meaning of this contract, so as to satisfy it. Now, what are the facts as regards the amount of the policy ? The amount was less than the contract price which the buyer of the corn had contracted to pay ; but there was evidence at the trial from which the jury might well have found, that the amount for which the policy of insurance had been effected was sufficient to cover the cost at the port of loading, and the cost of premiums, and of effecting the insurance : and, taking that to be the case, the question arises whether, in this case, in order to satisfy the contract, the vendors were bound to tender a policy of insurance, effected for such an amount as would be a complete indemnity to the buyer of the corn in case of any loss on the cargo ; or whether, in point of fact, the policy, being for such an amount as an ordinary shipper would have effected for protecting his interest in the port of dispatch, would not suffice. What was the duty devolving on the seller of the corn under this contract ? Was he bound to be himself the shipper of the corn, and to effect a policy in the amount contended for by the defendants ? It is conceded by the counsel for the defendants that the vendor of the corn was not bound, under this contract, to become the shipper of the corn. It was open to him to fulfil his contract, either by shipping corn himself, so as to satisfy the requirements of the contract, or to go into the market and buy from any merchant a cargo shipped in such a vessel, at such time, and in such

manner, as would satisfy the requirements of the contract. Supposing that he had taken the latter course, and had got the usual shipping documents delivered to him ; the bill of lading, and the policy of insurance effected at the time the cargo was shipped, were those which would have been sufficient shipping documents for the vendor under a contract precisely similar to this, if purchased by the vendor in the market : and would they cease to be shipping documents in his hands, so that he would not be able to hand them over to his vendee, in order to satisfy the terms of a precisely similar contract ? I think not. If there was any special custom, or any peculiar course of dealing, in this trade, rendering it necessary, in such a case, for the vendor to effect a policy for an amount sufficient to be a complete indemnity in the sense contended for by the vendee of the corn, evidence should have been given by the defendants to that effect, in order that the opinion of the jury might be taken : but no such evidence was given ; and, in my opinion, there is no rule of law compelling us to put such a construction as is contended for by the defendants on the words " shipping documents " in the contract. For these reasons I think that this rule should be discharged.

1861.

TAMVACO

v.

LUCAS.

BLACKBURN J. I am of the same opinion. The question turns on the construction of this contract, which, as I read it, is a contract to supply a cargo afloat of a particular description, and to furnish the shipping documents in exchange for the price. The cargo itself is not shipped when the contract is made, nor is it known what will be the name of the ship ; it is merely a contract to supply such a cargo as described ; and I perfectly agree with the defendants that they would not be bound

1861.

TAMVACO

V.

LUCAS.

to pay the stipulated price, unless proper shipping documents were given to them ; by which I mean, not only a proper bill of lading and the proper charter party applicable to such a cargo as that which is described in the contract, but also a policy of insurance for the proper amount. The number of quarters of grain that were to constitute the cargo are stipulated for in the contract ; and the time and manner in which it is to be supplied are fixed by the contract. On these points there is no doubt whatever ; but the amount of the policy which the parties contemplated at this time is not, in express terms, mentioned in the contract at all. The objection taken at the trial was, that, by fixing the price at which the vendors, the plaintiffs, were to supply this cargo afloat, they also fixed the amount to cover which the policy ought to be made out : and, if that were so, the defendants would be right in saying that the policy tendered was not sufficient. But I agree with the rest of the Court in thinking that that is not the true construction of the contract. If this had been the case of a contract for selling afloat a cargo already shipped in a specific ship (which was originally the more common way in which these transactions were carried on), and the plaintiffs had, as is usual in the market, sold the same cargo from one to another, the contract only varying in price, each vendor in succession stipulating to furnish the shipping documents, I take it to be quite plain, for the reasons which my brother *Crompton* has given, that the amount of the policy, which was originally the proper shipping document of such a cargo, could not vary from time to time, according to the different prices which were inserted in the different contracts by the different persons who were passing it from

one to the other. To say that the policy must so vary, would be to make its amount dependent on the market and the Corn Exchange of this country, and cause that amount to fluctuate with the fluctuations of the corn market ; which would certainly be very inconvenient. This, then, being a contract to supply a cargo afloat, the documents which were furnished would be such as would fairly belong to such a cargo when afloat ; and the amount of the policy, as I said before, must depend, not upon the contract price in this country for which the contractor is to furnish such a cargo, but on the nature and kind of the cargo itself. The amount of the policy must be such as would fairly and truly cover and protect that cargo so described. My brother *Hill*, whose reasons I will not repeat, has pointed out that, at the trial, there was evidence enough on which the jury might have found that this policy was quite sufficient to cover the cost of the cargo at the port of loading, and of the insurance ; and the point taken at the trial not being a question of fact, but merely a question of law, viz.—whether the construction of the contract compelled the plaintiffs to make a policy covering the larger sum,—the defendants are not entitled to have the rule made absolute on any doubtful point not left to the jury, and on which they were not asked to decide. I need hardly say that I quite agree with what has fallen from the other members of the Court, that the policy was not to include the freight, which never was at the risk of the defendants ; for, if the ship had gone down, they would not have been called upon to pay the freight, and therefore to say that they were entitled to a policy which, in the event of the ship going down, would enable them to

1861.

TAMVAGO

V.
LUCAS.

1861.

TANVAOO

v.

LUCAS.

recover the value of the freight, which they had not paid, would be, in my opinion, an argument ad absurdum, and a contradiction of all the cases from *Baillie v. Moudigiani* (a) downwards.

Rule discharged (b).

(a) 1 *Park on Insurance*, 8th ed. p. 116.

(b) Reported by *J. C. Mathew, Esq.*

Monday,
May 6th.

CURETON against The QUEEN (in error).

9 G. 4. c. 69.

Indictment.

Conviction by
justices of the
peace.

1. An indictment, under stat. 9 G. 4. c. 69., alleged that the defendant, on &c., was duly convicted before &c., three justices of the peace, for that he, in the night of 18th December 1854, by night, after the expiration of the first hour after sunset, and before the beginning of the first hour before sunrise, did by night then and there unlawfully enter a certain close &c. with a gun, for the purpose of then and there taking and destroying game, contrary to the statute &c., and was adjudged for the said offence, the same being his first offence, &c. That the defendant afterwards, to wit &c., was duly convicted before &c., two justices of the peace &c., for that he, in the night of 24th November 1858, by night, unlawfully did enter and be in and upon certain enclosed land &c., with certain instruments, for the purpose of killing, taking and destroying game thereon, this being his second offence, contrary to the form &c., and was adjudged for his said offence &c. That the defendant, after he had been so twice convicted as aforesaid, to wit 25th November 1860, by night, did unlawfully enter and be in and upon certain enclosed land for the purpose, by night, as aforesaid, of therein taking and destroying game, and was then and there by night unlawfully in the said land, with a certain gun and other instruments, for the purpose, by night as aforesaid, of therein taking and destroying game, against the form of the statute &c.: Held, that this indictment was good, seeing that it did not profess to set out the prior convictions "in hæc verba."

2. *Quære*, whether it was not good at all events?

3. A conviction, under stat. 9 G. 4. c. 69., alleging that the defendant by night, after the expiration of the first hour after sunset, and before the beginning of the first hour before sunrise, did by night then and there unlawfully enter a certain close &c., with a gun, for the purpose of then and there taking and destroying game, contrary to the statute &c., is good.

4. *Quære*, per Cockburn C. J. and Hill J., as to the decision in *Fletcher v. Callthrop*, 6 Q. B. 880.

W RIT of error to reverse a judgment of the Court of Quarter Sessions of *Staffordshire*, holden 31st December, 1860. The indictment was as follows:—

Staffordshire, to wit.] The jurors for our Lady the Queen upon their oath present that *George Cureton*, on the 26th of *December* A.D. 1854, at *Wolverhampton*, in the county of *Stafford*, was duly convicted before *Henry Hill*, *William Tarratt*, and *Richard Fowler Butler*, Esquires, three of Her said Majesty's Justices of the Peace for the said county of *Stafford*, for that he the said *George Cureton*, within the space of six calendar months then last past, to wit, in the night of the 18th *December*, in the year aforesaid, by night, after the expiration of the first hour after sunset, and before the beginning of the first hour before sunrise, that is to say, about the hour of five o'clock of the night of the day and year last aforesaid, did by night then and there unlawfully enter a certain close of land situate in the parish of *Tettenhall*, in the said county of *Stafford*, in the occupation of the Lord *Wrottesly*, with a gun, for the purpose of then and there taking and destroying game, contrary to an Act passed in the ninth year of the reign of His Majesty King *George* the Fourth, intituled "An Act for the more effectual prevention of persons going armed by night for the destruction of game;" and the said *George Cureton* was thereupon then and there adjudged for his said offence, the same being his first offence, to be imprisoned in the House of Correction at *Stafford*, in and for the said county of *Stafford*, and there kept to hard labour for the period of three calendar months, and at the expiration of such period to find sureties by recognizance, himself in the sum of 10*l.*, and two sureties in the sum of 5*l.* each, or one surety in the sum of 10*l.*, conditioned that he the said *George Cureton* should not so offend again for the space of one year then next following, and in case he should not find such sureties or surety as

1861.

CURETON
V.
The QUEEN.

1861.
CURETON
v.
The QUEEN.

aforesaid that he should be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties or surety should be sooner found.

And the jurors &c. further present that the said *George Cureton* afterwards, to wit on the 27th of *November*, A.D. 1858, at the parish of *Shiffnal*, in the county of *Salop*, was duly convicted before *St. John Chiverton Charlton*, Esq., and the Rev. *George Whitmore*, clerk, two of Her Majesty's justices of the peace, in and for the said county of *Salop*, for that he, the said *George Cureton*, within six calendar months next before the making of the information on which the said conviction on the 27th of *November*, 1858, was founded, to wit on the 24th of *November* in the year aforesaid, in the night of the same day, at the parish of *Shiffnal*, in the said county of *Salop*, by night unlawfully did enter and be in and upon certain enclosed land in the said parish of *Shiffnal*, in the occupation of *William Henry Slaine*y, Esq., with certain instruments for the purpose of killing, taking, and destroying game thereon, this being his second offence, contrary to the form of the statute in such case made and provided; and the said *George Cureton* was thereupon then and there adjudged for his said offence to be imprisoned in the House of Correction at *Shrewsbury*, in the said county of *Salop*, and there kept to hard labour for the period of six calendar months, and at the expiration of such period to find sureties by recognizance, himself in the sum of 20*l.*, and two sureties in the sum of 10*l.* each, or one surety in the sum of 20*l.*, conditioned that he the said *George Cureton* should not so offend again for the space of two years then next following; and it was further adjudged that he the said *George Cureton*, in case he

should not find such sureties as aforesaid, should be further imprisoned, and kept to hard labour for the space of one year, unless such sureties should be sooner found.

1861.

CURETON
v.
The QUEEN.

And the jurors &c. do further present that he the said *George Cureton* afterwards, and after he had been so twice convicted as aforesaid, and within twelve calendar months now last past, to wit on the 25th of *November*, A.D. 1860, by night, to wit, about the hour of two o'clock in the night of the same day, did unlawfully enter and be in and upon certain enclosed land in the parish of *Codsall*, in the county of *Stafford*, in the occupation of *William Fleming Fryer*, for the purpose by night as aforesaid of therein taking and destroying game, and was then and there by night unlawfully in the said land, with a certain gun and other instruments, for the purpose by night as aforesaid of therein taking and destroying game, against the form of the statute in such case made and provided, and against the peace, &c.

On this indictment the defendant was convicted and sentenced to be imprisoned and kept to hard labour in the House of Correction for nine calendar months. The grounds of error assigned were:—

1. That the conviction in the indictment mentioned of *George Cureton*, before *St. John Chiverton Charlton*, Esq., and the Rev. *George Whitmore*, clerk, was bad and insufficient in law, and shewed no jurisdiction in them to convict and adjudicate upon him as therein mentioned. 2. That the conviction in the indictment mentioned of *George Cureton*, before *Henry Hill*, *William Tarratt*, and *Richard Fowler Butler*, Esqrs., was bad and insufficient in law. 3. That it did

1861.

 CURETON
 v.
 The QUEEN.

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1861.

CURETON
v.
The QUEEN.

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1861.

 CURETON
 v.
 The QUEEN.

former offence may not have been an offence under this statute. The uniform course of pleading supports this view; and it is also confirmed by the 5th section of the statute, which gives the following form of conviction:—
 “Be it remembered that on, &c., in the county of, &c., A. O. is convicted before us, &c., for that he the said A. O. did” [specify the offence, and the time and place when and where the crime was committed, as the case may be, and on a second conviction state the first conviction,] “and we the said justices adjudge the said A. O. for his said offence,” &c. In *Regina v. Reynolds* (a), *Wightman J.* says, “It may indeed, be argued, that the expression ‘not to offend again,’ may mean not to offend again under this Act; but even if that were the true construction, it would be met by another difficulty,—namely, that several offences are created by the Act, and the recognizances ought to be confined to this particular offence. Therefore the conviction being in this form, it is bad; and, I think that *prima facie*, I must assume that the commitment correctly recites the conviction.” In *Rex v. Allen* (b) a conviction upon an indictment for a second offence against 42 G. 3. c. 107. s. 2., by killing deer, was held wrong, for the following reasons:—1. That it was not stated in the indictment that the defendant was duly convicted. 2. That he was not duly convicted, as the conviction was in the wrong county. 3. That the conviction was of four persons, whereas the indictment stated it as a conviction of the defendant only. [*Hill J.* There was a variance. *Blackburn J.* And the convicting justices were not of the proper county.] In *Paley on Convictions*,

(a) 13 L. J. M. C. 65.

(b) *Russ. & Ry. Cr. Cas.* 513.

p. 216 (4th ed.), speaking of cases where a conviction is bad for excess, it is said, "In awarding the punishment, whether pecuniary or corporeal, the magistrate should be careful not to exceed the authority given him by the statute, for a conviction, if bad in part, is wholly bad, and in this respect differs from an order." And at p. 217, "Where a commitment under The Master and Servants Act (4 G. 4. c. 34.) required the keeper to receive the defendant into custody, there to remain and *be corrected*, and held to hard labour for one month, the Court held it to be bad as authorizing a punishment not warranted by the statute, which imposes only imprisonment with hard labour. *Wood v. Fenwick*, 10 M. & W. 195. It was said *arguendo* that correction was to be understood of a correction by whipping, and Lord Abinger, C. B., said, 'It is clear the being "corrected" means something beyond the hard labour, whether by whipping or otherwise, and so is out of the statute.' " [Crompton J. Suppose this conviction had been brought up by certiorari, we might have amended it, under stat. 12 & 13 Vict. c. 45. s. 7., if it had been shewn to us that the justices had in fact jurisdiction.] It is only "informal" matter which can be amended under that Act.

1861.

 CURETON
 V.
 The QUEEN.

Secondly, the offence created by the statute consists in entering, &c., land "armed with any gun, net, engine or other instrument" for the purpose, &c.; whereas the second conviction only says that the defendant entered the land "with certain instruments," &c., not specifying what they were, or even that they were "used" for the purpose of killing, &c., game. A conviction should follow the statute on which it is founded, and in some instances must be even more precise than the statute itself. If the nature of the instrument had been stated

1861.

 CURETON
 v.
 The QUEEN.

in this conviction, the Court would have been enabled to judge whether it was one that could be used for the taking or destruction of game. An indictment for obtaining money under false pretences must state what the false pretences were; and in *Colborne v. Stockdale* (a) it was held that a plea, to an action on a bond, that the consideration for it was money won by gaming, must set out the game. [*Cockburn C. J.* Suppose the instrument had no name?] Then it should have been described as an instrument the name of which was to the jurors unknown. [*Crompton J.* A false pretence must be proved as laid; but under this indictment the proof of his having been there with any instrument for taking or destroying game would be sufficient.]

Thirdly, the second conviction does not allege that the defendant entered this land for the purpose of taking and destroying game "by night" on that land; but only that "by night" he unlawfully did enter, &c. This is a departure from the precedents. Suppose it were alleged that "*A. B.* went by night into a railway carriage to go to *Edinburgh*;" that would not shew that he meant to reach *Edinburgh* "by night." In *Fletcher v. Calthrop* (b) a conviction under this statute, stating that a certain person "did by night unlawfully enter certain enclosed land, with a net, for the purpose of taking game, contrary to the form of the statute," was held bad for not stating the intent to be to take game there. [*Hill J.*, I cannot understand *Fletcher v. Calthrop* (b); and, with the greatest possible respect for the Judges by whom it was decided, I think that if the point in that case ever arises again it will deserve consideration. *Cockburn C. J.* I agree with my brother *Hill*.] In

(a) 1 Str. 493.

(b) 6 Q. B. 880.

Davies v. The King (a), where an indictment under this statute alleged that certain persons, "on, &c., did by night unlawfully enter divers closes, &c., there situate, and being in the occupation of *E. C.*, and were then and there in the said closes, &c., armed with guns, &c., for the purpose of then and there destroying game;" it was held bad for not containing a sufficient averment that the defendants were "by night" in the closes armed for the purpose alleged. Lord *Tenterden* C. J., in delivering judgment, says, "If the words 'by night' had occurred at the beginning of the sentence, they might have governed the whole, or if they had been at the end of the sentence, they might have referred to the whole, but here they are in the middle of the sentence, and are applied to a particular branch of it, and cannot be extended to that which follows."

1861.

CURETON
v.
THE QUEEN.

Fourthly, the first conviction is also defective: it alleges that the party was duly convicted, &c., "for that he did by night then and there unlawfully enter a certain close with a gun, for the purpose of then and there taking and destroying game." It ought to have averred that the act was done by night, on the particular close. *Davies v. The King (a)* also applies here.

Fifthly, the first conviction ought to have alleged the act to have been done "by night," according to the definition of that word in the statute: the 12th section of which enacts: "For the purposes of this Act the night shall be considered and is hereby declared to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise." The first conviction states the time as "after the expiration of the first hour after sunset, and before the beginning

(a) 10 B. & C. 89.

1861.

 CURETON
 v.
 The QUEEN.

of the first hour before sunrise," a period which is not only a departure from the statute, but impossible; for the statute having spoken of the "*last* hour before sunrise," the *first* hour before sunrise must mean between midnight and 1 a.m., any time before which on the same day is impossible.

A. Staveley Hill, who appeared for the Crown, was not called on.

COCKBURN C. J. Our judgment must be for the defendant in error. This indictment is in all respects sufficient. The first objection to it is that it does not appear on the face of the second conviction that the defendant was convicted of a previous offence against the Act; but the answer to that is that in this indictment the former convictions are not set out in *hæc verba*, in the precise language of the convictions themselves. In such an indictment, all that is necessary, in order to give the Court jurisdiction, is to shew that there have been two former convictions under the statute; and that is shewn here. The indictment alleges that there had been a conviction of the plaintiff in error of an offence within the statute; and it then goes on to state that, before certain justices of the peace, he was a second time convicted of an offence within the statute, "*being his second offence.*" Here, therefore, are two convictions; and, the first being set out, and an offence shewn in the second, it is clear there was jurisdiction in the justices to convict and punish as for a second offence.

But even if it were necessary to the validity of this indictment that the second conviction to which it refers should be set out with all technical strictness, I am not convinced that that is not satisfied by what is here stated.

For the statute says that if a person who has been convicted of an offence under it is convicted a second time, he is liable to a heavier punishment than for the previous offence. And if this second conviction, as here stated, were before us on the question of its validity, seeing that the words of the Act are followed and satisfied, I am disposed to think that, on the strictest rules of construction, what is alleged in it would be held sufficient. A man is convicted on information for a first offence; then facts are stated shewing the commission of a second offence, and that certain justices of the peace convicted him on the facts contained in the second information, "being his second offence." This is the language of the conviction, and is the same as that used in the statute: and as in the statute the second offence means an offence committed after a former conviction, the former conviction must be understood as included in the latter. I do not know that it is necessary for us to go this length on the present occasion, but I should be ready to do so if it were necessary to dispose of the question before us.

As to the other questions raised by Mr. *Matthews*, the authorities which he has cited do not bear out the objections he has made. With reference to the allegations of place and time, the language of this conviction differs from that in the cases referred to. Here the expression "by night," preceding the whole clause, quite cures the difficulty as to the allegation of "time" which existed in those cases; and the word "there" distinguishes it from those relating to "place." Then, as to the objection to the second conviction, founded on the generality of the statement of the instrument used, when we look at the statute we see that any instrument used for the purpose of taking or destroying game is

1861.

CURETON
v.
The QUEEN.

1861.

CURETON
v.
The QUEEN.

what it requires for the offence, and in this conviction we find it alleged that the offence was committed by night in this land, with instruments, for the purpose of taking and destroying game: the latter words being applicable to the instrument as well as to the presence of the party gets rid of all difficulty.

On the whole, therefore, I am of opinion that this indictment is well drawn, and that our judgment must be for the Crown.

CROMPTON, HILL and BLACKBURN Js. concurred.

Judgment for the Crown.

Tuesday,
May 7th.

POW against DAVIS.

*Groundless
assumption of
authority as
agent.
Damages.*

A., professing to have authority from the owners of certain premises, granted a parol lease of them for seven years to *B.*, and let him into possession. The owners, disavowing the authority of *A.*, demanded possession of the premises from *B.*; and, on his refusal, brought an ejectment against him. *B.*, relying on a statement of *A.* that he had authority to act as he did, and that the ejectment would not be persevered in, and also on the advice of his own attorney, defended the ejectment, but unsuccessfully, and was turned out of possession. *B.* having brought an action against *A.* for this false assumption of authority, the jury found that *A.* had acted bona fide and without fraud, and through a misapprehension that he had authority. Held that *B.* was not entitled to recover as damages against *A.* the costs incurred in defending the ejectment.

THE first count of the declaration alleged that, in consideration that the plaintiff would enter upon the possession of certain premises at *Peckham Rye*, in the county of *Surrey*, then late in the occupation of one *George Peacock*, and consent to take the same as tenant thereof for a certain term, to wit of seven years from a certain day, to wit the 16th *February* 1860, at the rent of 45*l.* per annum, the defendant then promised

the plaintiff that he, the defendant, then had lawful power and authority from the persons having the right thereto to give the plaintiff possession of the premises, and to agree to let the same to the plaintiff for the term and upon the terms aforesaid. It then averred that the plaintiff, relying on the defendant's promise, did enter upon the premises and consent to take the same as tenant thereof, for the term and upon the terms aforesaid; but that the defendant disregarded his promise in this, that he had not lawful power or authority from the persons having the right thereto to give the plaintiff possession of the premises, or to agree to let the same for the term and upon the terms aforesaid; whereby and by reason of which premises *J. G. Templeman, W. S. Jay* and *E. A. Jay*, then having the right to the possession of the premises, afterwards recovered possession of the same, before the expiration of seven years from the 16th day of *February* 1860, in an action of ejectment; and the plaintiff was thereby deprived of the possession of the premises, and became liable to pay a large sum of money, to wit the sum of 41*l.* 2*s.*, as and for the damages and costs of the said *J. G. Templeman &c.* by them recovered in that action; and also paid a large sum of money, and also incurred other great costs and expenses in and about defending that action, and lost large sums of money that he had expended about the repairing and improving the premises, and was deprived of great profits and advantages which he would have derived from the possession of the premises, and was otherwise greatly injured and damaged.

The second count alleged that the defendant had been entrusted with the key of a certain house and pre-

1861.

 Pow
v.
Davis.

1861.

Pow
v.
DAVIS.

mises at *Peckham Rye &c.*, and thereupon the defendant did falsely and fraudulently represent and pretend to the plaintiff that he was authorized by the persons entitled to the house and premises to give to the plaintiff possession thereof, and to agree to let the same for a certain time, to wit the term of seven years, from a certain day, to wit the 16th *February* 1860, at the rent of 45*l.* per annum; whereupon the plaintiff, then confiding in the representations of the defendant, and believing that the defendant had such authority &c., at the request of the defendant, agreed with the defendant to and did enter into possession of, the house and premises, and agreed to take the same on lease for the time and upon the terms aforesaid; whereas in truth and in fact the defendant was not then authorized by the said persons, or any person or persons entitled to the premises, to give to the plaintiff possession of the premises, or to agree to let the same for the time and at the rent aforesaid, as he the defendant at the time of his making his said false and deceitful representations well knew. It then averred that, by means of the premises, the defendant, at the time of making that agreement with the plaintiff, deceived the plaintiff; and afterwards, and before the expiration of seven years from the 16th *February* 1860, *J. G. Templeman, &c.* recovered the premises from the plaintiff in an action of ejectment, and the plaintiff was thereby deprived of the possession of the premises, and became liable to pay a large sum of money, to wit the sum of 41*l.* 2*s.*, as and for the damages and costs of *J. G. Templeman, &c.*, by them recovered in the action; and also paid a large sum of money, and also incurred other great costs and expenses, in and about defending that action, and

lost large sums of money that he had expended about the repairing and improving the premises, and was deprived of great profits and advantages which he would have derived from the possession of the premises, and was otherwise greatly injured and damnified.

1861.

Pow
v.
DAVIS.

The third count alleged that the defendant falsely, fraudulently and deceitfully represented and pretended to and promised the plaintiff, that authority had been given him by certain persons, to wit *J. G. Templeman, &c.*, to let a certain house and premises &c., for the sum of 45*l.* per annum; whereupon and whereby the plaintiff, confiding in the representation of the defendant, at the suggestion of the defendant, was induced to hold and retain possession of that house and premises, and to expend divers large sums of money in repairing and occupying the same, and retaining possession thereof, and, at the request and suggestion of the defendant, to defend a certain action which was brought against him for the recovery of the premises by certain persons, to wit the said *J. G. Templeman, &c.*, and who then had the right to the possession of the house and premises; whereas in truth and in fact authority had not been given to the defendant by the said *J. G. Templeman, &c.*, to let the house and premises for the said sum of 45*l.* per annum, as he the defendant, at the time of making the said representation, well knew: whereby and by means whereof the plaintiff lost the possession of the premises, and the repairs and all the sums of money he the plaintiff had expended in such repairs; and also was put to and incurred and sustained great costs and expenses in and about defending that action, and judgment was obtained against him therein, and he was forced and compelled to pay to the

1861.

Pow
v.
DAVIS.

plaintiffs their costs therein, amounting to 41*l.* 2*s.*, and was otherwise put to and incurred great costs, charges and expenses in and about the retaining possession of the house and premises, and defending that suit.

There was also a count for money paid and on accounts stated.

The defendant pleaded :

1. To the first count, non assumpsit.
2. To the same count, that the plaintiff did not enter upon the premises or consent to take the same as tenant thereof, for the term and upon the terms alleged.
3. To the same count, a traverse of the breach.
4. To the second and third counts, not guilty.
5. To the second count, that the plaintiff did not agree with the defendant to enter or enter into possession of the house and premises, or agree to take the same as lessee, for the term or upon the terms alleged.
6. To the third count, non assumpsit.
7. To the same count, a denial that the plaintiff was induced to hold or retain possession of the house and premises, or to expend the said sum of money in repairing or occupying the same, or retaining possession thereof, or to defend the action as alleged.
8. To the common count, never indebted.

Issues on all the pleas.

At the trial, before *Blackburn, J.*, at the *London* *Sittings* in *July*, 1860, it appeared that *J. G. Templeman*, *W. S. Jay*, and *E. A. Jay*, were proprietors of certain premises at *Peckham Rye*, in *Surrey*; and that the defendant was a house agent and appraiser, who, professing to act by their authority, made a parol lease of the premises to the plaintiff for seven years, at a yearly rent of 45*l.*, and put him in possession accordingly. *Temple-*

men and the other two proprietors, however, disavowed the authority of the defendant to make the lease, demanded possession of the premises from the plaintiff, and, on his refusal, brought an ejectment against him. This ejectment the plaintiff, acting on a statement of the defendant that he had authority to act as he did, and that the ejectment would not be persevered in, and also on the advice of his own attorney, defended, but unsuccessfully, and was turned out of possession. He then brought the present action against the defendant to recover 56*l.* 2*s.*, the amount of his costs incurred in defending the ejectment, and 8*l.* for certain repairs which he had done to the premises while in possession. On this state of things the learned Judge held that the parol lease was void in law, and left the case to the jury; who found that the defendant had no authority from the proprietors of these premises to make a lease of them, but that, when he assumed that authority in this instance he acted bona fide and without fraud, and through a misapprehension that he had authority; also that the expenses of the repairs were reasonably incurred by the plaintiff in reliance on the authority of the defendant to make the lease: and that, in defending the ejectment, the plaintiff acted reasonably under the circumstances. A verdict was accordingly entered for the plaintiff for the 8*l.*, with leave to move to increase it by the other sum of 56*l.* 2*s.*

A rule nisi was obtained in *Michaelmas* Term 1860.

Hawkins now shewed cause. This rule was granted on the authority of *Collen v. Wright* (a), where it was held that a party who professes to do an act which he has no authority for doing, is liable for any damage caused to

(a) 7 E. & B. 301.; affirmed on error, 8 E. & B. 647.

1861.

POW
v.
DAVIS.

1861.

 POW
 v.
 DAVIE.

another party by that assumption of authority. But it is a principle of law that damages must be the natural, ordinary and probable result of the wrongful act, which the damages here are not. For, even if the defendant had authority to make a lease, inasmuch as the parol lease for seven years which he made was void by the Statute of Frauds, 29 C. 2. c. 3. ss. 1 and 2., for not being in writing, and by stat. 8 & 9 Vict. c. 106. s. 3., for not being by deed, the plaintiff was merely a tenant at will, and had no defence to the ejectment: *Drury v. Macnamara* (a). His only remedy was by application to a Court of equity to compel the owners of the land to perform the contract of their agent.

M. Chambers and *Dowdeswell*, in support of the rule. In defending the ejectment the plaintiff did nothing more than a reasonable man would have done. At all events he did it by the advice of the defendant, who was liable to him in consequence; *Williams v. Burrell* (b), *Blyth v. Smith* (c).

COCKBURN C. J. I am of opinion that this rule must be discharged. It appears to me clear that the damage which has accrued to the plaintiff by reason of the costs incurred in defending the ejectment that was brought against him, is not a matter to which the warranty given him by the defendant, in respect of which he is called on to indemnify the plaintiff, extends. That warranty was that the defendant had authority to bind his alleged principals, the owners of certain premises, by an agreement entered into by him with the plaintiff that the owners should grant to the plaintiff a lease for seven years, and in

(a) 5 E. & B. 612.

(b) 1 C. B. 402.

(c) 5 Man. & G. 405.

the meantime that he, the defendant, on their behalf, had authority to permit the plaintiff to enter into possession. The jury have negatived the authority of the defendant to act as he did ; but we must consider the case as though he had that authority, and then see whether, even then, his principals would have been prevented from maintaining this ejectment. We shall then be able to solve the question whether the defendant is liable for the exercise of that authority which he assumed to have, but which in fact did not exist.

It is clear what would have been the position of the plaintiff if the defendant had that authority. The law is that, in order to make an agreement for a seven years lease operative, there must be a deed under seal, which was totally wanting in this case, and therefore, if the plaintiff had been let into possession under such circumstances, he would have been no more than a tenant at will, liable, like every such tenant, to have the will determined, and ejectment brought against him. And his only remedy, in the event of such a contingency, would have been by having recourse to a Court of equity to enforce the contract by ordering the execution of the necessary legal documents. Supposing therefore, the defendant had, to the full extent, the authority under which he professed to act, although the plaintiff might have gone into equity to enforce the contract in its terms, he would have been unprotected against an action of ejectment, if the owners of the property had thought proper, contrary to equity and justice, to bring one against him.

That being the state of things, and those the consequences that would have followed if the defendant had the authority which he held himself out as having, it is contended that, when it turned out that he had not

1861.

 POW
v.
DAVIS.

1861.

Pow
v.
DAVIS.

that authority, he became liable to all the consequences that would flow naturally from the act he did, just as his principals would have been liable if he had made this agreement with their sanction and authority. The plaintiff cannot be in a better position than he would have been under those circumstances. He would have been entitled to go to equity to restrain the ejectment, and should have done so on this occasion, and if defeated in equity, would have been entitled to hold the defendant responsible for what had taken place. Instead of that he defends the ejectment, which he could not have done even if the defendant had full authority to act as he did. Can he, then, hold the defendant responsible for the erroneous course he has himself adopted? No. It is clear that the ejectment was wholly incapable of being defended, and that that was a matter which any one (certainly any one conversant with the law) ought to have known. Then, however, it is said the defendant misled the plaintiff by opening out to him the prospect that if he resisted the action of ejectment the owners would not go on with it. That was very bad advice, and the plaintiff must very soon have found out that it was based altogether in error. But the question we have to solve is whether the consequential injury to the plaintiff, for which he now seeks compensation in damages, is comprehended in and naturally flows out of the warranty given by the defendant. For the reasons already stated, I think not.

It is urged that, in defending the ejectment, the plaintiff acted as a reasonable man would have done, and that the jury have so found, but they have done so, I think, upon by no means sufficient grounds. If the plaintiff acted on the advice of the defendant, I do not think

it was a reasonable course; but it appears that he also consulted his own attorney, and the attorney took an erroneous view of his position. Can it be said that a man is entitled, under those circumstances, to call on another person to indemnify him against the consequences in a matter on which he was bound to exercise his own discretion? It may be urged that a reasonable man should follow the directions of his legal adviser,—a proposition true as regards his own conduct, but not applicable so to render other persons liable. The plaintiff here took a wrong course—it may be under the bad advice of the defendant; but that advice he was by no means bound to follow. Where, indeed, a person warrants to another that he has title or authority to do some act, he is liable to that person if the warranty fails. If, then, that person defends an action at the instance of the person who gave the warranty, though that defence may not be successful, and the action may possibly have been one which no man conversant with law, or alive to the value of facts, would have defended, still, as that was done by the sanction and authority of the person who gave the warranty, it may well be said, as indeed the authorities which have been cited by the plaintiff's counsel shew, that the party who thus stood between the two litigants, is liable to the one in the event of the defence failing. But his liability is always co-extensive with the warranty which has been given, and here the defence of the ejectment was beyond the warranty.

1861.

 POW
 V.
 DAVIS.

CROMPTON and BLACKBURN J^s. concurred.

HILL J. had left the Court.

Rule discharged.

1861.

*Tuesday,
May 7th.*

CARR against COOPER.

*Amendment.
Appearance
by guardian.
Practice.*

After the plaintiff, in a cause in which the defendant appeared by attorney, had signed judgment, proceedings in error were taken by the defendant, on the ground that, being an infant, he ought to have appeared by guardian: held, that the Court had no power, either under the Common Law Procedure Act, 1852 (15 & 16 *Vict. c. 76.*), sect. 222, or otherwise, to amend the proceedings, by alleging an appearance by guardian; but that they had power to set them aside, and order the defendant to appear by guardian.

THIS was an action for debauching *M. C.*, the daughter and servant of the plaintiff, to which the defendant appeared by attorney, and pleaded Not guilty, with a traverse of *M. C.* being servant of the plaintiff. The cause having been tried, the plaintiff recovered a verdict for 50*l.* After costs had been taxed and judgment signed, proceedings in error were taken by the defendant, on the ground that he, being an infant, should have appeared by guardian, and not by attorney. It appeared by the affidavits that the plaintiff had taken steps in this cause after the fact of the defendant's infancy was made known to him.

R. G. Williams, on the part of the plaintiff, obtained, in the present Term, a rule to shew cause "why the appearance in the action should not be amended by the defendant appearing by guardian within six days; or, in default thereof, why the plaintiff might not assign *John Doe* as the defendant's guardian; and amend the appearance as an appearance by guardian; and why the pleas and other proceedings should not be amended

accordingly, and why the defendant should not pay the costs &c., and why all proceedings in error should not be stayed &c." A Judge at Chambers had refused to interfere.

1861.

CARR
V.
COOPER.

Milward now shewed cause. The object of this application is to deprive the defendant of the benefit of his proceedings in error. No such application has ever been entertained, unless where collusion or concealment was shewn. The plaintiff here was in fault in taking steps after he heard that the defendant was an infant. [*Cockburn* C. J. There is a case of *Shipman v. Stevens* (a), where a statute appearance had been entered for the defendant, who afterwards pleaded by attorney, and, when the cause was coming on for trial, it was discovered that the defendant was an infant, whereupon the plaintiff did not proceed to trial, but moved to strike out the appearance and oblige the defendant to appear and plead by guardian &c., and amend the record. It appeared, also, that, after plea, the attorney for the plaintiff knew that the defendant was an infant. There the Court said: "The plaintiff's attorney ought to have applied to the defendant to name a guardian; and, if he did not do so in six days, then plaintiff ought to have applied to the Court to oblige him so to do; and it was the plaintiffs' attorney's own fault to proceed erroneously, although no notice had been given to him that the defendant was not of full age; and if the plaintiff had proceeded to judgment, and error had been brought, and afterwards the plaintiff had moved here to have made the record right, this Court would not have done it." The Court accordingly directed the defendant to plead by guardian

(a) 2 *Wils.* 50.

1861.

 CARR
 v.
 COOPER.

in six days, and the record to be made agreeably thereunto. *Hill J.* In order to prevent further expence we ought to set aside the appearance and all subsequent proceedings, but without costs, as the plaintiff did not come soon enough after he discovered the false step.] There can be no objection to that.

R. G. Williams, contra. The making this rule absolute in its terms will not deprive the defendant of his right to proceed in error. The false step which renders this rule necessary was the wrongful act of the defendant, not of the plaintiff. The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76.), sect. 222., enables the Court to amend in cases like the present. In *Wilkinson v. Sharland* (a) it was held that amendment under that Act may be made after proceedings in error have been commenced. *Parke B.* there says: "I think that we ought to extend the power of amendment as far as we reasonably can, in order to prevent parties from being tripped up by technical objections." [*Cockburn C. J.* We quite agree with that; and if any thing erroneous appeared on this record we could correct it. But the objection here is not founded on any mere erroneous statement or technical inaccuracy, and is such that we cannot make the correction consistently with truth. The whole suit has been conducted without the intervention of any guardian of the defendant, and now you want us to put on the record an allegation that it was conducted by guardian.] In *Goodright v. Wright* (b), after judgment for the plaintiff in ejectment, the defendant delivered into Court a writ of error assigning his infancy for error, but the Court refused to allow it.

(a) 11 *ErrA.* 33.(b) 1 *Str.* 33.

[*Blackburn J.* That was the case of an ejectment.
Crompton J. Ejectment being a mere creature of the Court, the Court could do with it as they pleased.
Hill J. The Lord Chief Justice there says: "The defendant ought not to be allowed to assign this error in ejectment, for he comes in of his own accord, and prays to be made defendant, which the plaintiff cannot oppose. This is an abuse upon the Court, and the attorney ought to be committed." In the same volume, p. 445, there is also a case of *Power v. Jones* on this subject.]

1861.

 CARR
 V.
 COOPER.

COCKBURN C. J. We have no power to do what is here asked. There is no longer any real distinction between appearance by guardian and appearance by attorney, and it would be far better that the useless idle law creating that distinction should be repealed than that we should place an untruth on our records.

The rest of the Court concurring:

Rule absolute to set aside the proceedings subsequent to the appearance; the defendant to appear by guardian within six days.

END OF EASTER TERM.

[1860.]

CASES

ARGUED AND DETERMINED

IN

EASTER VACATION,

XXIV. VICTORIA.

The Judges who usually sat in Banc in this
Vacation were:

COCKBURN C. J.

HILL J.

CROMPTON J.

BLACKBURN J.

[Saturday,
July 7th,
1860.]

ZWILCHENBART and others *against* ALEXANDER
and others.

*Vendor and
vendee.
Inspection of
goods on de-
livery.
Duties of
broker and of
shipping
agent, singly
and combined.*

The defendants, merchants and shipbrokers at *Bristol*, who had before acted as agents for the plaintiffs, merchants at *Liverpool*, in shipping iron, offered to them some "good old scrap iron" belonging to *O.*, (for whom they were also acting as brokers), specifying the descriptive quality and price of the iron. The plaintiffs asked for an offer of cost and freight from *Bristol* to *Rotterdam*, and a further description of the iron. The defendants wrote and gave the description; and afterwards wrote naming a ship, and the rate of freight. The plaintiffs agreed to purchase the iron at the price proposed, but objected to the ship; and the iron was subsequently shipped at *Bristol* on board another ship, chartered by the defendants on behalf of plaintiffs. The sold note for the iron, sent by the defendants, was signed by *O.*, and stated the iron to be "sold" to the defendants "for their principals," and to be "weighed and delivered alongside a vessel or vessels." The defendants received no remuneration from the plaintiffs, but received commission from *O.* and from the owners of the ship. The iron afterwards turned out to be of a much inferior quality to that agreed upon. In an action by the plaintiffs against the defendants for negligence in accepting and shipping at *Bristol*, and paying *O.* for, iron of that inferior quality: Held, by the Court of Queen's Bench, that the defendants were not liable: that they acted in the

transaction in two capacities, viz., as brokers between the plaintiffs and O., in negotiating the sale of the iron; and, subsequently, as agents for plaintiffs in receiving and forwarding the iron: that the two retainers were distinct; and that, as shipping agents under the latter, the defendants were not bound, and had no authority, in the absence of any usage to that effect, to accept or reject, on behalf of the plaintiffs, on its arrival at *Bristol*, the iron of which they had previously, as brokers only, negotiated the purchase.

Judgment affirmed in the Exchequer Chamber.

[1860.]

ZWILCHEN-
BART
V.
ALEXANDER.

THE declaration stated that, before and at the time of making the promises thereafter mentioned, plaintiffs were merchants at *Liverpool*, and defendants were agents at *Bristol*, and were employed, to wit, by one *H. Oatway*, as his agents, to sell for him from 180 to 200 tons of wrought handpicked scrap iron (composed of, principally, nut-iron, axles, tires, ship bolts, rails and boiler plates, &c.), at 4*l.* 12*s.* 6*d.* per ton, for certain reward, from the said *H. Oatway* to them, as such agents in that behalf, whereof plaintiffs had notice; and thereupon, in consideration that plaintiffs would purchase such iron from the said *H. Oatway* on the terms aforesaid, through and by means of defendants as such agents, and would thereby enable defendants to earn the said reward from the said *H. Oatway*; and that plaintiffs would employ defendants as the agents of plaintiffs to accept such iron from the said *H. Oatway*, and to ship it for plaintiffs to foreign parts, to wit to *Rotterdam*, in a certain ship to be engaged and chartered by defendants for plaintiffs; and that plaintiffs would transmit to defendants as such agents, for payment to the said *H. Oatway*, the price of such iron, according to the terms aforesaid, defendants promised plaintiffs to use proper and reasonable care and skill and diligence as such agents, in respect of the premises, and of the accepting and shipping of such iron. Averment, that plaintiffs, confiding in the promise of defendants, did

[1880.]

ZWILCHEN-
BART
V.
ALEXANDER.

agree to purchase, and did become the purchasers of, such iron from the said *H. Oatway*, on the terms aforesaid, through and by means of defendants as such agents as aforesaid, on behalf of them the plaintiffs, to accept and ship the said iron, and did transmit to defendants the price of the said iron in cash, according to the terms of the purchase. And although defendants accepted the said employment, and did as such agents of the plaintiffs accept from the said *H. Oatway*, and did ship to *Rotterdam*, in and on board of a certain ship, to wit *The Sophie*, which was engaged and chartered by them, defendants, for plaintiffs for that purpose, certain iron and other articles purporting to be iron, to wit 200 tons, as and for the iron so purchased by plaintiffs as aforesaid; and although defendants could and might and ought, as such agents, by any reasonable and proper care, skill and diligence in that behalf, have known and seen that the said iron and other articles so accepted and shipped as aforesaid, was not iron such as had been purchased for plaintiffs as aforesaid, and might have rejected and refused to accept the same on behalf of plaintiffs, and could and might and ought to have refused to pay the price thereof to the said *H. Oatway* as the seller thereof, without informing plaintiffs of the premises; yet defendants so carelessly and negligently, and with so little care, skill and diligence, behaved and conducted themselves as such agents of the plaintiffs in and about the premises, that by reason thereof the said iron shipped on board of the said ship was not wrought handpicked scrap iron, composed of nut-iron &c., but was iron of a kind greatly inferior thereto, and a great portion of which consisted of, &c., and other similar worthless articles, and of

which not the principal part, but a very small part only, to wit two or three per cent., was composed of nut iron &c. ; and defendants gave no notice or information of the premises to plaintiffs, and paid over to the said *H. Oatway* the price of the said iron so transmitted to them by plaintiffs as aforesaid without in anywise informing plaintiffs of the premises ; by reason whereof the said iron and other articles so shipped as aforesaid were sent to *Rotterdam* aforesaid, and from thence forwarded on, to wit &c., to certain customers of plaintiffs, to whom they had contracted to sell a quantity of such iron as was agreed to be purchased by them from the said *H. Oatway* ; that by reason thereof the iron was rejected by the said customers, and was sold by plaintiffs at a loss, and that they suffered damage in and about the freight and carriage of the same.

[1860.]

ZWILCHEN-
BART
V.
ALEXANDER.

Pleas. 1. Non assumpsit.

2. That plaintiffs did not agree to purchase, and did not become the purchasers of, the iron from *H. Oatway*, on the terms alleged, through or by means of defendants as such agents as in the declaration alleged.

3. That plaintiffs did not employ defendants or transmit to them as alleged, nor did defendants accept the employment as alleged.

4. That defendants did not, as agents of plaintiffs, accept from *H. Oatway* or ship to *Rotterdam*, in and on board a ship engaged or chartered by defendants for plaintiffs, iron or other articles as alleged.

5. That defendants could not, and might not, and ought not, as agents as aforesaid, by using reasonable or proper care, skill or diligence in that behalf, have known or seen that the said iron and other articles so

[1860.]
 ZWILCHEN-
 BART
 V.
 ALEXANDER.

accepted and shipped were not iron such as had been purchased for plaintiffs as aforesaid, and could not have rejected or refused to accept the same on behalf of plaintiffs, or refused to pay the price thereof to *H. Oatway* as the seller, without informing plaintiffs of the premises.

6. A general denial of the truth of any part of the breach.

Issue was joined on all the pleas.

At the trial, before *Cockburn C. J.*, at the Sittings in *London* after *Michaelmas* Term 1859, it appeared that the defendants, who were merchants and shipbrokers at *Bristol*, had acted therein as agents of the plaintiffs, merchants at *Liverpool*, in the shipment of iron to *Germany*. On 8th *June* 1857, the defendants wrote to the plaintiffs, stating that they were "offered 100 to 150 tons of good old scrap iron for immediate delivery, at 4*l.* 12*s.* 6*d.* a ton, alongside a vessel;" and inquiring whether this would suit the plaintiffs. The plaintiffs replied on 9th *June*, inquiring the description of the scrap iron, and the freight to *Rotterdam*, and adding, "if you can make us a firm offer, we hope to be able to place the lot."

On 10th *June* the defendants wrote as follows:—

"*Bristol, June 10th, 1857.*

"Dear Sirs. We have the offer of 180 to 200 tons of wrought, hand picked scrap iron (composed principally of nut-iron, axles, tiers, ships' bolts, rails and boiler plates &c.), at 4*l.* 12*s.* 6*d.* per ton, weighed and delivered alongside a vessel here. Payment, cash on handing bill of lading, and, as we have until *Saturday*, the 13th instant, we are unable at the moment to make you an offer of this parcel, cost and freight, although

we have little doubt we could procure freight for it hence to *Rotterdam*, at 11s. 6d. to 12s. 6d. per ton; and in case you are disposed to purchase, we shall be glad to hear from you, if possible, by return of post, or, at any rate, on *Saturday* next, as we must refuse or confirm the offer on that day. The quality of the iron is that which is usually shipped from here to *Prussia, Hamburg*, &c.; and awaiting your reply, we remain &c.

[1860.]

ZWILCHEN-
BART
V.
ALEXANDER.

(Signed) *M. J. F. & A. Alexander.*"

On the same day the defendants wrote to the plaintiffs, stating that they had an offer of *The Victor* to load 110 to 120 tons of the iron, for *Rotterdam*, at 5l. 5s. per ton, cost and freight included.

On 11th *June* the plaintiffs wrote to the defendants, asking them to keep open the offer until *Monday*, as they had scarcely time to hear from their friends in *Germany* whether they would accept the iron.

To this the defendants replied as follows.

"*Bristol, June 12th, 1857.*

"Messrs. *E. Zwilchenbart & Co.*

"Dear Sirs. Your esteemed favour of yesterday came duly to hand, and we have seen the party who holds the scrap iron; and although he will not positively bind himself to keep the offer of it open until *Monday*, yet we have no doubt, if we hear from you by post or telegraph on that day accepting it, we shall be enabled to close the purchase. With respect to the offer of the *Danish* vessel we have in hand for *Rotterdam*, we fear we shall be unable to prevail on the captain to wait until next *Monday*, although our best endeavours shall be used for that purpose. We remain &c.

"*M. J. F. & A. Alexander.*"

On the 13th of *June* the plaintiffs received from their

[1860.]
 ZWILCHEN-
 BART
 v.
 ALEXANDER.

friends in *Germany* a telegram, of which the following is a copy:—"Offer accepted 5*l.* 10*s.*, including freight to *Rotterdam*."

The plaintiffs, on *June* 13th, wrote as follows.

"*Liverpool*, 13th *June* 1857.

"We accept on terms named 200 tons, about, of scrap iron. *Victor* would leave awkward quantity to get off; should prefer larger vessel to take the whole at same freight, or less; and we await contract. Yours &c.

"*E. Zwilchenbart*."

On the same day the defendants wrote: "We had this pleasure yesterday, and have just received your message of to-day accepting the offer of the 180 to 200 tons old iron; and annexed we hand you a copy of the contract. We notice you will prefer a vessel to take the whole quantity to *Rotterdam*, and we will do our best to accomplish your wishes."

The sold note inclosed was in the following form.

"Sold Messrs. *M. J. F. & A. Alexander*, for their principals, from 180 to 200 tons of wrought, hand picked scrap iron, composed of principally nut iron, axles, tires, ships' bolts, nails and boiler plates &c., at 4*l.* 12*s.* 6*d.* per ton, weighed and delivered alongside a vessel or vessels. Payment, cash on iron being shipped and bills of lading signed for same.

"Pro. *H. Oatway & Co., W. Evans*."

On 15th *June* the plaintiffs acknowledged the receipt of the contract, adding that they were waiting the advice of a charter to *Rotterdam* for the iron. On 15th *June* the defendants wrote to say that *The Victor* could not be had, and inquired whether they should ship the iron by steamer, naming the rate of freight. This the plaintiffs declined, stating that they were in no imme-

date hurry for the shipment, and that the defendants might look out for a suitable vessel at a cheap freight. Some further correspondence then took place about chartering a vessel. *The Sophie* was offered and accepted; and the charter party was signed by the captain and the defendants. On 18th *June* the defendants wrote as follows.

[1860.]
 ZWILCHNER-
 BART
 V.
 ALEXANDER.

"The shipment of the scrap iron per *Sophie* being this day completed, we herewith enclose the bills of lading and invoice of the same, amounting to 983*l.* 6*s.*, for which please remit us a cash draft in course. (The cargo per *Sophie* is considered a first rate description of scrap iron)."

The following is a copy of the invoice.

"Invoice of a cargo of old scrap iron purchased by order of Messrs. *E. Zwilchenbart & Co.*, of *Liverpool*, and shipped for their account and risk per *Danish* schooner *Sophie*. *H. C. Tormal*, Mr., for *Rotterdam*.

	£	s.	d.
"Old wrought scrap iron, weighing 200 tons, 9 cwt., at			
£4. 12 <i>s.</i> 6 <i>d.</i> per ton	-	-	- 927 1 7
"Brokerage $\frac{1}{2}$ per cent.	-	-	- 4 12 8
			£931 14 3
"Watchman superintending loading of the cargo	-	-	- 1 4 0
"Customs entry and incidentals	-	-	- 0 7 9
			£933 6 0

(Signed) "*E. E. Bristol*, 18th *July* 1857.

"Messrs. *J. F. & A. Alexander*."

On 20th *July* the plaintiffs remitted the amount of the invoice, less commission, which they deducted. The following is an extract from their letter :—

"We are in receipt of your favour of *Saturday's* date with *B. L.* for scrap iron shipped per *Sophie*, which, however, we observe, is signed for 'weight unknown;' and, in the event of any deficiency on the other side, we

[1860.]
 ZWILCHEN-
 BART
 v.
 ALEXANDER.

must hold you responsible for short weight. From your invoice we have deducted the charges of half per cent. brokerage, as charging such to the buyer of metal is quite contrary to usage. The seller invariably pays the brokerage. In settlement of your invoice we beg to enclose a draft on demand on *Overend, Gurney & Co.* for 928*l.* 13*s.* 4*d.*, which please acknowledge."

"*E. Zwilchenbart & Co.*"

The defendants replied as follows :

"*M. J. F. & A. Alexander & Co.* to *E. Zwilchenbart & Co.*" *Bristol, 21st July, 1857.*

"We are duly favoured with your esteemed of yesterday, covering cash order on Messrs. *Overend, Gurney & Co., London*, for 928*l.* 13*s.* 4*d.*, amount of invoice of old scrap iron, shipped per *Sophie* to *Rotterdam*, less 4*l.* 12*s.* 8*d.*, our half per cent. brokerage for the purchase of same, and we have credited you accordingly. We noted your remarks with regard to its not being usual with you for the purchaser of metals to pay brokerage; but, having always received it from our other friends, and it being quite customary here to charge it, we did not for a moment anticipate that you would object to pay it; but, of course, as you say it is an unusual charge, we must leave the matter in the hands of your good selves.

"Yours &c.

(Signed) "*M. J. F. & A. Alexander.*"

On 14th *September* the plaintiffs wrote to the defendants, stating that they had just heard from Germany that the iron was not such as had been described, but of an almost worthless description. To this the defendants replied on the next day, saying "All we can do in the matter, as your agents, is to give notice to *Oatway*

& Co., the sellers, that you will hold them liable for all loss, damages, &c., that may be incurred in consequence of the iron (as is alleged) not proving to be as described in the contract, a copy of which we sent you on the 13th June." The plaintiffs then wrote to state that they should hold the defendants responsible; and the defendants replied, repudiating any responsibility in the matter.

The defendants received no brokerage or remuneration from the plaintiffs in the course of the transaction, but they received a commission of 1*l.* 5*s.* per cent. calculated upon the invoice price of the iron, from *Oatway*, which was paid by him to the defendants by their deducting it from the invoice price transmitted through them. The defendants also received a commission of 5*l.* per cent. from the owners of *The Sophie*, on the charter freight of the iron to *Rotterdam*, which commission was paid them by the master.

At the conclusion of the plaintiffs' case the defendants' counsel submitted that there was no case to go to the jury in support of the contract alleged. The Lord Chief Justice held that there was; and a verdict was found for the plaintiffs, leave being reserved to move to enter a verdict for the defendants, if the Court of Queen's Bench should be of opinion, on the evidence, that the case ought to have been withdrawn from the jury.

Montague Smith, in last *Hilary* Term, obtained a rule nisi accordingly.

Mellish and *Crompton Hutton* shewed cause (a). If

(a) *Friday, May 25th, and Monday, May 28th. Before Cockburn C. J., Wightman, Crompton and Blackburn JJ.*

[1860.]

ZWILCHEN-
BART
V.
ALEXANDER.

[1860.]

ZWILCHEN-
BAET
V.
ALEXANDER.

the defendants were the agents of the plaintiffs for the purpose of accepting the iron, they are liable for not exercising due care in accepting it. Now the jury have found, as a fact, that the defendants were the plaintiffs' agents for that purpose. That finding was consistent with the evidence furnished by the correspondence with respect to the usual course of dealing in transactions of this kind; and the actual contract, created by those letters, clearly made the defendants responsible, not merely for the delivery and the shipping of the iron, but for its being of the proper description and quality. Their duties were, in fact, to include all that the plaintiffs would otherwise have had to do at *Bristol*; and it was in consideration of the defendants doing this, that the plaintiffs, who would otherwise have had to go to *Bristol* and inspect the iron themselves, employed the defendants. [*Cockburn C. J.* The plaintiffs might have employed another person to examine the iron, and might have employed the defendants merely for the purpose of receiving and shipping it.] The inference is the other way: if the defendants were to do all that was to be done at *Bristol*, the examination of the iron would be part of their business. [*Cockburn C. J.* The defendants get no commission from the plaintiffs.] Their commission is from the vendors upon the sale, and from the owner of the ship upon the shipment; but the defendants are not the less retained for reward by the plaintiffs; the employment which the plaintiffs agree to give the defendants, in consideration of their agreement to receive, examine, and ship the iron, is an employment for remuneration, though the remuneration produced by it is paid by other parties. Then, being so employed as agents, the defendants were bound to examine the iron before accept-

ing and shipping it. They had placed themselves, as the plaintiffs' agents, in the position of the plaintiffs themselves, as regarded the acceptance of the iron; and they were bound to exercise that right, which the plaintiffs would clearly have had and exercised if they had been acting for themselves, of examining the iron upon delivery, and before any act of dominion had been exercised over it by them, so as to be able to reject it if it were not that which was contracted for. The plaintiffs, through the defendant's want of care, lost their power of rejecting. [*Cockburn C. J.* That would have happened even if they had employed the defendants only to ship.] The defendants chose to agree, in effect, that they would take the plaintiffs' place for the purpose of accepting the iron: they are therefore liable for want of care in accepting. [*Cockburn C. J.* You must bring to their knowledge the terms of the contract.] It is clear that they had such knowledge; and that the inferiority of the iron was such as they could not have failed to perceive on inspection. [They were then stopped by the Court.]

[1860.]

ZWILCHEN-
BART
V.
ALEXANDER.

Montague Smith and Karlake, contra. The contract alleged in the declaration was not proved. The defendants did not undertake to see that the iron forwarded by *Oatway* was of the proper quality. They acted, in the first instance, as brokers for the sale of the iron, and, subsequently, as the plaintiffs' agents in receiving and forwarding the iron so sold; but they did not undertake to be answerable for its quality. They had no power to reject it; although a rejection by them would, of course, have been good if the plaintiffs had afterwards ratified it. [*Wightman J.* Were the defendants bound to receive whatever *Oatway* chose to send? *Cockburn C. J.* Even

[1860.]

 ZWILCHEN-
 BART
 v.
 ALEXANDER.

if what was sent were such as they knew that the plaintiffs would not have accepted ?] The defendants did not contract with the plaintiffs to *accept* at all. The fallacy of the argument on behalf of the plaintiffs consists in assuming that the defendants contracted to accept. The retainer of the defendants by the plaintiffs was two fold ; one, as brokers between *Oatway* and the plaintiffs, for the sale of the iron ; the other, as agents of the plaintiffs, to charter a ship and ship the iron : so that they were, after the iron had been purchased, merely in the position of shipping agents for the plaintiffs, and were not, as such, bound to see that the iron shipped corresponded with the iron purchased by them in their previous capacity of brokers ; a relation which ended upon the purchase of the iron.

Mellish and *Crompton Hutton* [called upon by the Court.] There was one continuous retainer of the defendants by the plaintiffs. The defendants were aware, from the first, that the receiving and inspection of the iron were part of the duties for the performance of which they were originally retained. The words "weighed and delivered" in the sold note, are strongly in favour of this inference. As to the power to reject, it is clear that the defendants were, by the contract, to represent the plaintiffs at *Bristol* for all purposes : and, as representing the plaintiffs, they were not precluded, by the mere receipt of the iron, from inspecting it, and rejecting it if it was not of the quality contracted for ; *Street v. Blay* (a).

Cur. adv. vult.

(a) 2 B. & Ad. 456.

COCKBURN C. J. now delivered the judgment of the Court.

[1860.]

ZWILCHEN-
BART
V.
ALEXANDER.

The question in this case was, whether the defendants, merchants at *Bristol*, who had acted as brokers for the plaintiffs, who are merchants at *Liverpool*, as purchasers, as well as for the seller, a merchant at *Bristol*, in the sale of a quantity of scrap iron of a quality specified in the contract, and also as the agents of the plaintiffs in shipping the iron for the continent, were liable to the plaintiffs for accepting and shipping such iron, it being an ascertained fact that the iron was so far inferior in quality to the description specified in the contract as that, if the duty of seeing to its quality attached to the defendants, they had been guilty of negligence in accepting it.

It appeared that the defendants had written to the plaintiffs proposing to them to purchase the iron in question, describing it as of a specified quality. The plaintiffs answered, desiring to have an offer of cost and freight to *Rotterdam*. To this the defendants replied, stating the price, but also stating their inability to make an offer as to freight, as they had then no ship available, but expressing their conviction that they should shortly be able to find a ship. Subsequently, and before the plaintiffs had closed with the offer, the defendants again wrote, proposing a ship for the conveyance of the iron. The plaintiffs, in answer, accepted the purchase, but objected to the particular ship, as too small to take the whole cargo; desiring the defendants to look out for another. Hereupon the defendants, as agents for both parties, entered into and accepted the contract of sale, and transmitted the same to the plaintiffs. They afterwards

[1860.]
ZWILCHEN-
BART
V.
ALEXANDER.

engaged a vessel to convey the iron, received the same, and caused it to be shipped; assuring the plaintiffs, in one of their letters, that the cargo was considered a first rate description of scrap iron. As has been stated, the iron turned out to be of very inferior quality to the description specified in the contract; and, the plaintiffs having sustained a serious loss in consequence, the present action was brought: and, the question is, whether, under the circumstances, the defendants are liable.

Now it cannot be contended that, as the brokers negotiating the contract of sale between the seller of the iron and the plaintiffs as buyers, any responsibility attached to the defendants in respect of the quality of the article sold. Then, did any such obligation attach upon their employment by the plaintiffs to ship the iron? It seems clear that an obligation to see to the quality of goods required to be shipped does not necessarily arise on the employment of a shipping agent. Such a duty may exist from usage in a particular department of trade; but, in the absence of any such usage, it can only arise from the agreement of the parties. But there was here no evidence whatever of usage: and the correspondence between the parties was altogether silent as to any supervision or discretion to be exercised by the defendants in accepting or rejecting the iron.

It was urged upon us, indeed, that it was contemplated between the parties, from the beginning, that the iron, when bought, should be shipped by the defendants for the plaintiffs; and that, as the plaintiffs were not resident at *Bristol*, and had no opportunity of inspecting the iron themselves, and as the defendants were cognizant of the terms of the contract, it must be inferred that the

understanding was that the defendants were to see that the iron was of the quality contracted for before they received it on account of the plaintiffs. This reasoning does not, however, appear to us to be conclusive. Though it may possibly have been contemplated throughout, between the parties, that the iron should be shipped by the defendants, there was no binding engagement on either side to that effect; and the plaintiffs, after accepting the purchase, might have employed another agent to ship. So they might themselves have proceeded to inspect and accept or reject the iron, or have sent another agent to inspect and accept or reject it. There is nowhere in the correspondence any instruction to the defendants to look to the quality of the iron, or authority to them to reject it. And, as we have already pointed out, no such duty or authority ought necessarily to be implied from the nature of the employment as shipping agents; more especially as, in the present instance, the defendants were to receive no remuneration from the plaintiffs, their profit being derived from commission from the seller on the sale, and from commission from the shipowner on chartering the vessel which was to convey the iron. It may well have been that the plaintiffs looked only to the liability of the seller, who was then believed to be solvent, though he afterwards turned out to be otherwise. At all events, we are of opinion that no obligation, express or implied, is made out to render the defendants liable.

We agree that the question was properly one for the jury, if there was evidence of any engagement by the defendants to see to the quality of the iron before accepting and shipping it; but, leave having been reserved to set the verdict aside and enter a verdict for the

[1860.]

 ZWILCHEN-
BART
V.
ALEXANDER.

[1860.]

ZWILCHEN-
BART
V.
ALEXANDER.

defendants, if the Court should be of opinion that there was not evidence to be left to the jury in support of that position, we are of opinion that there was an absence of such evidence; and consequently that the rule must be made absolute.

Rule absolute.

1861.

IN THE EXCHEQUER CHAMBER.

Thursday,
May 9th.

ZWILCHENBART and another, appellants, *against*
ALEXANDER and another, respondents.

For marginal note, see ante, p. 234.

THE plaintiffs having appealed to the Exchequer Chamber,

Mellish was now (*a*) heard for the appellants (plaintiffs below). The argument was substantially the same as in the Court below.

Karslake, in the course of his argument for the respondents, was stopped by the Court.

Mellish was heard in reply.

POLLOCK C. B. I am of opinion that the judgment of the Court of Queen's Bench should be affirmed. The declaration puts the alleged cause of action as arising upon a contract: but perhaps it will be better to consider it as a question of duty. The plaintiffs

(*a*) Before Pollock C. B., Bramwell B., Williams, Wiles, Byles and Keating JJ.

allege that the defendants (who, it is to be observed, were not to receive any remuneration from the plaintiffs) had a certain duty to perform towards the plaintiffs, for the nonperformance of which they would be liable to an action for negligence. The declaration states, in effect, that the defendants, in consideration of an advantage procured for them by the plaintiffs in employing them, undertook to do all that was reasonable for the defendants to do under the circumstances. I do not think it is a satisfactory plan to leave the particular terms of the contract to be assumed from this general allegation. It is better to state the contract in detail, or to lay at once a breach of duty. But, further, I do not think there is such combined consideration as is alleged in the declaration, or one which raises the alleged liability in the defendants. I do not, however, rest my judgment on that ground. At the trial the question raised was, was it the duty of the defendants to inspect the iron? It was urged that, although there was no positive undertaking by them to do so, the duty to do so necessarily arose out of their relation to the plaintiffs. Now the defendants acted in a twofold capacity; as brokers between *Oatway* and the plaintiffs for the purchase of the iron, and as agents of the plaintiffs for shipping it. For their services in the first capacity they were paid by the vendor; for their services in the second by the owner of the ship. How could a duty arise in them, in either capacity, to inspect the iron? It was argued that there was, in fact, one continuous retainer of the defendants by the plaintiffs both as brokers and shipping agents. But, even if so, that which is not a duty in either capacity singly cannot become a duty by the two capacities being combined; unless there be a usage that,

1861.

ZWILCHEN-
BART
V.
ALEXANDER.

1861.

ZWILCHEN-
HART
V.
ALEXANDER.

where there is such combination, such duty arises. But of usage there was no evidence at all: and, in the absence of evidence to that effect, the question whether the duty arose upon such combination could not well have been left to the jury. Independently, therefore, of the declaration, I think that the judgment of the Court below should be affirmed.

WILLIAMS J. I am of the same opinion: and give my judgment, not upon any point raised by the pleadings, but upon the question really raised by the parties at the trial. I think there was no evidence of such obligation on the defendants as was set up. I am not prepared to say that, in some cases, where a party undertakes the combined duties of broker and shipping agent, some implied contract on his part may not arise which would not arise where he acts in either capacity singly. But there was no such combined retainer here, in my opinion.

WILLES, BYLES and KEATING JJ., and BRAMWELL B. concurred.

Judgment affirmed.

[1860.]

ROBERT WILEY *against* THOMAS CRAWFORD and
JOHN WILLIAM FENWICK.

[Saturday,
July 7th,
1860.]

The Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104., enacts that "the certificate of registry shall be used only for the lawful navigation of the ship, and shall not be subject to detention by reason of any title, lien, charge, or interest whatsoever which any owner, mortgagee, or other person may have or claim to have on or in the ship described in such certificate: and if any person whatever" "refuses on request to deliver up such certificate when in his possession or under his controul to the person for the time being entitled to the custody thereof for the purposes of such lawful navigation," proceedings may be taken before a justice; "and unless it is proved" "that there was reasonable cause for such refusal, the offender shall incur a penalty not exceeding 100*l*."; which, or any part of which, by sect. 524, the justice may, if he thinks fit, direct to be applied in compensating any person for damage sustained by him in consequence of the wrongful act.

Held, by the Court of Queen's Bench,

1. That the effect of sect. 50 is to make any pledge of the certificate, for any purpose whatever, though for a good consideration, illegal and void; and, consequently, any detainer of a certificate so pledged illegal.

2. That, where the person entitled to the custody of the certificate for the purposes of navigation is also the owner of the ship, he has a right of action against the party so detaining the certificate, in addition to his remedy, in the former character, by a complaint before a justice. And this, though he be himself the pledger, and for a good consideration.

Judgment affirmed in the Exchequer Chamber, but with hesitation.

3. Quære, by the Court of Queen's Bench, whether an action at law would lie, by the party merely entitled to the custody, for the detainer made unlawful by the penal part of the enactment. If it would, *semble* that the declaration should, in that case, aver absence of reasonable cause.

*Merchant
Shipping Act,
1854.
Certificate of
registry.
Action for
detention.*

THE declaration stated that plaintiff was the owner of a certain vessel called *The Pacific*, which was then ready for sea, and about to sail on a foreign voyage, of which defendants had notice: that plaintiff deposited with defendants the certificate of registry, which had been granted according to the statute in such case made, and which was used for the lawful navigation of the said vessel: that she was then about to proceed to sea on a foreign voyage, and was ready,

[1860.]

WILEY
v.
CRAWFORD.

and about to sail. That defendants, being then in possession of the said certificate of registry, and plaintiff being the person entitled to the custody of the said certificate, according to the statute in such case made and provided, requested them to deliver up the said certificate for the purposes of such lawful navigation as aforesaid : yet defendants refused to deliver the said certificate up to plaintiff, being the person for the time being entitled to the custody thereof, for the purposes of such lawful navigation as aforesaid, whereby the said vessel of plaintiff was prevented from sailing or going to sea, and plaintiff was forced and compelled to keep and detain the said vessel in harbour until the said certificate should be delivered up, and the said vessel was necessarily detained and prevented from going to sea by reason of defendants' said refusal : and plaintiff lost the profits which would and might have accrued to him from the sailing of the said vessel, and was put to expense in paying wages of the crew during such detention, and was otherwise injured.

Pleas : 1. Not guilty. 2. That plaintiff was not, at the time when &c., entitled to the custody of the said certificate as alleged. 3. That plaintiff did not make such request as alleged. 4. Leave and licence.

Issues on all the pleas.

On the trial, before *Blackburn J.*, at the *Liverpool Spring Assizes*, 1860, it appeared that, on 1st *April*, 1858, *The Pacific* was at *North Shields*, and ready to sail on a voyage to *Spain*. On that day a *Mr. Ingledew* made a claim upon the plaintiff, who was captain and owner of *The Pacific*, as mortgagee of another ship, *The Isabella*, of which the plaintiff had formerly been owner, and which had been lost ; and they went together

to the office of the defendants, who were attorneys at *North Shields*, and acted as attorneys for *Ingledeu*, for the purpose of settling the matter. The defendant *Fenwick* threatened to arrest the plaintiff unless he deposited the certificate of registry of *The Pacific*, as a security against his sailing, and proposed that it should be deposited for ten days. The plaintiff refused, saying that he was ready for sea, but that, as the weather looked adverse, he should not object to deposit it till the 5th *April*, thinking, as he swore at the trial, that there was no chance of getting to sea before then. On 3d *April* the wind changed, and the plaintiff, finding that he could get to sea, then demanded the registry from the defendants, which they refused to give up until the 5th *April*, when they gave it back to the plaintiff. By that time the wind had changed, and plaintiff was prevented from going to sea.

The defendants' counsel objected that sect. 50 of The Merchant Shipping Act, 1854, 17 & 18 *Vict. c. 104.*, did not apply to the case of the plaintiff; who, as owner, had a right to divest himself of the custody of the certificate, and could not afterwards demand it back in his character of captain, as being entitled to it for the purposes of navigation. The plaintiff's counsel contended that, as the deposit was made without consideration, the plaintiff was entitled, under the Act, to demand the certificate, and that an action at law lay for the refusal of the defendants to give it up.

A verdict was taken for the defendants, with leave to move to enter a verdict for the plaintiff for 32*l.*, the admitted amount of damages caused to the plaintiff by the detention.

[1860.]

 WILBY
 V.
 CRAWFORD.

[1860.]

WILBY
v.
CRAWFORD.

Brett, in last *Easter* Term, obtained a rule *Nisi* to enter the verdict for the plaintiff for that amount, on the ground that the detention of the register by the defendants was unlawful by virtue of sect. 50 of The Merchant Shipping Act, 1854, and that the plaintiff was damaged by reason of such unlawful act, and was therefore entitled to maintain this action.

Manisty also obtained a cross rule, on behalf of the defendants, to arrest the judgment (if the other rule should be made absolute), on the ground that the declaration was bad in law, and did not disclose any cause of action.

Manisty and *T. Jones* (Northern Circuit) shewed cause (a). The declaration is founded on sect. 50 of The Merchant Shipping Act, 1854, 17 & 18 *Vict.* c. 104., which enacts that "the certificate of registry shall be used only for the lawful navigation of the ship, and shall not be subject to detention by reason of any title, lien, charge, or interest whatsoever which any owner, mortgagee, or other person may have or claim to have on or in the ship described in such certificate; and if any person whatever, whether interested or not in the ship, refuses on request to deliver up such certificate when in his possession or under his control to the person for the time being entitled to the custody thereof for the purposes of such lawful navigation as aforesaid, or to any registrar, officer of the customs, or other person legally entitled to require such delivery, it shall be lawful for any justice, by warrant under his hand and seal, or for any Court capable of taking cognizance of such matter, to cause the person so refusing to appear before

(a) *Saturday, June 16th. Before Crompton, Hill and Blackburn JJ.*

[1860.]

 WILBY
 v.
 CRAWFORD.

him and to be examined touching such refusal; and unless it is proved to the satisfaction of such justice or Court that there was reasonable cause for such refusal the offender shall incur a penalty not exceeding one hundred pounds; but if it is made to appear to such justice or Court that the certificate is lost, the party complained of shall be discharged, and such justice or Court shall thereupon certify that the certificate of registry is lost." Now, first (as to the cross rule), even if the plaintiff have any remedy, it is not by an action at law. Sect. 50 gives to justices, or to any Court of competent jurisdiction, power to deal summarily with the dispute, and to inflict a penalty, which, by sect. 524, they may direct to be applied by way of compensation for the damages sustained by the party complaining. The general rule is that, when a statute provides compensation, the statutory remedy is not cumulative, but is given in substitution for the ordinary remedy by action. In *Bowen v. Fox (a)*, where the question turned upon the construction of the corresponding section in the old Register Act, 4 G. 4. c. 41. s. 25., Lord *Tenterden* C. J. says "It may be a question whether, upon the true construction of this statute, a party can be said wilfully to detain a ship's register, if he does so by reason of a lien upon it. Assuming the right construction to be that the detention would be wilful, notwithstanding the lien, it does not follow that this action of trover was maintainable, being founded on the common law; for by that law a party cannot reclaim a thing pledged without paying all that is due upon the account for which it was pledged. If the plaintiff intended to avail himself of the right given by the

(a) 10 B. & C. 41.

[1860.]

WILEY

v.

CRAWFORD.

statute, he should have pursued the course pointed out by the statute." [Blackburn J. The language of stat. 4 G. 4. c. 41. s. 25. is different from that of stat. 17 & 18 Vict. c. 104. s. 50. Crompton J. Suppose the damages sustained in consequence of the detention of the certificate are more than 100*l.*, which is the extent of the penalty which can be inflicted under the statute: is not the injured party, in such a case, entitled to bring an action?] Secondly, the plaintiff is not the "person for the time being entitled to the custody" of the certificate "for the purposes of" "lawful navigation." After he had pledged the certificate, he was not entitled to the custody of it at all. Being master as well as owner, the right to the custody of the certificate for the purposes of lawful navigation was in him in the first instance: that appears from *Arkle v. Henzell* (a): but, in that combined capacity he had the right to divest himself of his possession of the certificate, if he chose. [Crompton J. The "lien" on the ship, which sect. 50 provides shall not justify the detention of the certificate, may mean a lien arising out of the claims of part owners. Here the lien, if there be one, is a lien on the certificate only, created by the deposit.] That is so: the ship itself is not charged at all. Sect. 50 was intended to apply only to disputes between part owners or mortgagees, and to prevent any one of them from enforcing his claim in respect of the ship, adversely to the others, by gaining possession of and detaining the certificate.

Further, the declaration alleges, not a detention of the certificate without reasonable cause, but an absolute refusal: so that it gives the defendants no opportunity of setting up a lawful cause of detention.

(a) 8 E. & B. 828.

Brett, contra. Sect. 50 of stat. 17 & 18 *Vict. c. 104.* has been substituted for sect. 23 of stat. 8 & 9 *Vict. c. 89.*, which enacted that a bond should be given to the Crown by the master and owner, or the master and a certain number of the part owners, with a condition that the certificate should "not be sold, lent, or otherwise disposed of to any person or persons whatsoever," and should be "solely made use of for the service of the ship." [*Blackburn J.* Sect. 80 of that Act seems to be the section corresponding with sect. 50 of stat. 17 & 18 *Vict. c. 104.*] Sect. 50 combines some of the provisions of both sections of the earlier Act; and, construing one Act by the other, it is clear that sect. 50 was not intended to apply merely to disputes between part owners or mortgagees, but, for the purpose of protecting shippers and merchants, and the public generally, to prevent the sailing of the ship from being delayed by the detention of the certificate in respect of any claim or lien whatever. The defendants, therefore, had no right to detain the certificate. As to the objection that the only remedy is by a proceeding before a justice, it is clear, as has been suggested by the Court, that the damages arising from the detention may be much greater than the penalty which, under sects. 50. 524., the justices may inflict and appropriate by way of compensation. [*Hill J.* Sect. 524 seems intended to provide for all loss.] As to the objection that the declaration does not allege that the detention was without reasonable cause, such allegation is not necessary in a declaration at common law, though it would be necessary to prove the fact in proceedings before justices. But the certificate here was not detained for reasonable cause, inasmuch as the only cause of detention

[1860.]

WILEY
V.
CRAWFORD.

[1860.]

WILEY
v.
CRAWFORD.

set up by the defendants was a deposit by the plaintiff, which the Act expressly provides is in no case to justify the withholding of the certificate from the person who is entitled to its custody for the purposes of lawful navigation; which the plaintiff, as captain and owner, clearly was.

Cur. adv. vult.

BLACKBURN J. now delivered the judgment of the Court.

The question arising in the first rule in this case is whether the plaintiff, upon the evidence at the trial, was the person for the time being entitled to the custody of the certificate of registry.

This depends upon the construction of sect. 50 of The Merchant Shipping Act, 1854. It appeared that the plaintiff had, for what seemed to us, when the rule was obtained, a sufficient consideration, pledged or deposited the certificate until the *Monday* after the day when the pledge or deposit was made, with a view of securing to the defendants that the ship should not sail until that time. On the *Saturday* preceding the *Monday*, the wind having changed, the plaintiff was desirous of sailing, and applied to the defendants for the certificate. Apart from the provisions of the statute, the defendants would have had a right to hold the certificate until the *Monday*, and the plaintiff would not have been entitled to the possession thereof as against the defendants claiming to hold under the deposit. The plaintiff, however, contends that, according to the provisions of the sect. 50 of the above statute, any such pledge or deposit is forbidden and void, and can confer no right to the pledgee to hold it, nor at all interfere with the right of

possession in the plaintiff, as master and owner, for the purposes of navigation.

[1860.]

WILBY
v.
CRAWFORD.

The proviso in the recent statute in question differs considerably from prior enactments. Stat. 4 G. 4. c. 41. s. 25., after reciting that it is not proper that any person, under any pretence, should detain the certificate of registry of any ship or vessel, or hold the same for any purpose other than the lawful use and navigation of the vessel, imposes a penalty on the person wilfully detaining the certificate of registry. On this statute the Court of King's Bench, in the case of *Bowen v. Fox (a)*, held that the pledge of the certificate gave a lien sufficient to defeat an action of trover: and they observed that, if the plaintiff intended to avail himself of the right given by the statute, he should have pursued the course pointed out by the statute; and they accordingly refused a rule to shew cause why the verdict for the defendants should not be set aside. By sect. 19 of this statute, 4 G. 4. c. 41., the bond to be given to the Crown is to be conditioned that the certificate shall *not be sold, lent, or otherwise disposed of*, but solely made use of for the service of the ship; and similar enactments to those in stat. 4 G. 4. c. 41. are contained in other statutes, and were continued by stat. 8 & 9 Vict. c. 89. These provisions, however, have now been abolished by stat. 17 & 18 Vict. c. 120.; and very different language is used in sect. 50 of The Merchant Shipping Act, 1854. By that section, instead of a *recital* of the propriety of the certificate being used for the purpose of navigation only, it is *directly enacted* that the certificate of registry shall be used *only* for the lawful navigation of the ship. And the plaintiff contends that this enactment makes it unlawful to use it by way of pledge.

(a) 10 B. & C. 41.

[1860.]

WILEY
v.
CRAWFORD.

It was said, on the part of the defendants, that the following words, "and shall not be subject to detention by reason of any title, lien, charge, or interest whatsoever which any owner, mortgagee, or other person may have or claim to have on or in the ship described in such certificate," restrict and limit the operation of the first part of the section, and confine its operation to the case of a lien or interest in the ship, so as to prevent any part owner or mortgagee or pledgee, by way of bottomry or otherwise, claiming any right to detain the certificate. We do not, however, think that this is the true construction of the clause. The section seems to consist of three parts; by the first of which the dealing with the certificate for any other purpose than the navigation of the ship is expressly forbidden. By the second branch the certificate is made not subject to detention by reason of any claim on the ship; probably to prevent any squabble amongst part owners or mortgagees hindering the navigation of the vessel. The first seems aimed at what the former statutes recited as improper, namely, the use for other purposes than the navigation, which must, we think, include a sale or pledge. And, whilst the former statutes seem to have made it a forfeiture of the bond, the present section seems to have forbidden such improper use altogether. The first branch providing against a sale or pledge of the certificate, the second seemed necessary to prevent any right to detain by reason of any claim, interest or lien in the ship itself. And the third part of the section makes a party detaining, in some cases, namely, those without reasonable cause for the refusal, liable to a penalty. If, then, the first part of the clause, as we think, forbids the pledging the certificate, by enacting that it shall not be used for any other purpose than the

navigation, it follows that such pledge is illegal and void, and gives no right to detain; and consequently the plaintiff, who, on the evidence, was both master and owner, was the person entitled to the possession as alleged in the declaration and traversed in the only plea now in question: and the plaintiff therefore is entitled to have the rule for entering the verdict for him on this plea made absolute.

[1860.]

WILEY
v.
CRAWFORD.

The second rule before us was to shew cause why the judgment should not be arrested on the ground of the declaration shewing no good cause of action. This rule was granted on the application of the defendants' counsel, not on any technical ground of special pleading, but to prevent his being shut out from any real defence he might have on the construction of the statute, if it should appear that such defence arose rather on the record than on the evidence. The plaintiff contended that the declaration was good, as shewing a wrongful act in contravention and disobedience of the statute, and a damage arising therefrom to the plaintiff: and it was, secondly, put as a right of action arising from the detention of the property to which the plaintiff was entitled, and which the defendants detained from him to his damage, under a pledge rendered invalid by the statute.

If the question were, whether the plaintiff could recover for the act of detainer made unlawful by the penal part of the enactment, the declaration would seem to require an averment that the detainer was without lawful excuse; and there would also be some doubt as to whether the remedy for the statutory wrong should not be pursued according to the mode pointed out by the statute, or whether the case might not fall within the

[1860.]

WILEY
v.
CRAWFORD.

principle of *Mayor of Lichfield v. Simpson* (a): in favour of which latter view it might be urged that in this case the damages may be greatly beyond any remedy which the party grieved could obtain under the penal part of the clause.

Assuming, however, that we are right in our construction of the statute, we think that there was, on the facts disclosed at the trial, a clear right of action, by reason of the right of property and possession being in the plaintiff and by the wrongful detainer occasioning the damage. It seems to us that, the plaintiff being entitled to the certificate, and the pledge of the certificate being illegal and null, the detainer thereof from the plaintiff after demanding its return for the purposes of navigation, and the damage to him arising therefrom, constitute a cause of action. It may possibly be that the conversion by the detainer should have been stated more expressly: but this fault, if there be any, would be amended by a few words which we should give liberty to insert if it became necessary.

The rule for arresting the judgment will therefore be discharged.

Rule for entering the verdict for the plaintiff made absolute.

Rule for arresting the judgment discharged.

(a) 8 Q. B. 65.

1861.

IN THE EXCHEQUER CHAMBER.

ROBERT WILEY *against* THOMAS CRAWFORD and *Friday,*
JOHN WILLIAM FENWICK. *May 10th.*

For marginal note, see *antè*, p. 253.

THE defendants having appealed from the above
decision,

In last *Hilary* Vacation (*a*),

T. Jones (Northern circuit) was heard for the appellants. The plaintiff could not avoid the pledge of the certificate which he had himself made for good consideration. It was held, by the Court below, that the enactment of sect. 50 of stat. 17 & 18 *Vict. c. 104.* was absolute and imperative, and rendered void any pledge or deposit whatever of the certificate, whether for good consideration or not; and that the plaintiff, being entitled to the custody of it, had a right to demand it from the defendants, and to bring an action upon their refusal to give it up. But the detention which the Legislature intended to make unlawful by sect. 50 was a detention, without reasonable cause, to the prejudice of the party entitled to the custody. That there must be a want of reasonable cause is shewn by the third member of the section, which requires such want of reasonable cause to be shewn to the justices: that the detention must be to the prejudice of the party entitled

(a) *Wednesday, February 6th.* Before *Williams, Willes, Byles* and *Keating JJ., Bramwell* and *Channell BB.*

1861.

WILEY
v.
CRAWFORD.

to the custody is shewn by the second member of the section, which treats only of a refusal to the party entitled. Now, first, the plaintiff is not the person "for the time being entitled to the custody" of the certificate "for the purposes of" "lawful navigation." He was entitled to the custody in the first instance, being captain and owner. But, if he chooses to waive that right, and to deposit it for a good consideration, he is no longer entitled to the custody, until he has paid what is due upon the account in respect of which it was pledged. Sect. 50 was intended to prevent injury to commerce from disputes between part owners or mortgagees, and a pledging of the certificate to, or a detention of it by, any one of them on account of some claim or lien upon the ship. Where there is no division of interest, as in the present case, the deposit of the certificate, and its detention in respect of a lien, does not work the mischief to prevent which the section was framed. In *Clarke v. Batters (a)*, which turned upon the construction of the earlier Ship Registry Act, 8 & 9 Vict. c. 89., Vice Chancellor Wood, in giving judgment, cites *Bowen v. Fox (b)*, and says that that case "establishes that such a species of property may be conferred in a certificate of a ship's registry, deposited by way of security for advances of money for the use of the ship, as to prevent the owner of the ship from demanding back the certificate till the money is repaid. Such a lien is not inconsistent with the policy of the Ship Registry Act." Secondly, the circumstances under which the deposit of the certificate was made in the present case furnished a reasonable cause for the refusal by the defendants to deliver it up to the plaintiff. But

(a) 1 K. & J. 242.

(b) 10 B. & C. 41.

further, the declaration, as framed, at all events shews no cause of action on the face of it. It alleges that the defendants refused contrary to the form of the statute in that case made. It ought to have also alleged that they refused without reasonable cause. And even if an amendment were made, as was suggested by the Court below, by adding an allegation of absence of reasonable cause, the defendants would still be entitled to judgment, as the averment, even so altered, was not proved in fact at the trial. [*Willes J.* I think that the Court below intended to suggest, by way of amendment, only a more direct averment of conversion.] There was no evidence at all of conversion; and abundant evidence of reasonable cause for the detainer. The detainer was the alleged cause of action: an averment of conversion would have altered the cause of action. [*Willes J.* In *Warlow v. Harrison* (a), where on appeal to this Court from the judgment of the Court of Queen's Bench, in favour of the defendant, we considered that as, on the facts of the case, though not upon the pleadings as they stood, the plaintiff was entitled to recover, the declaration might be amended so as to meet our view. *Williams J.* We are all of opinion that the only question in this case is, whether the plaintiff was entitled to the custody of the certificate, within the meaning of the statute.]

Brett, contra. The plaintiff, as captain, was entitled to the custody of the certificate for the purposes of navigation. The ship cannot clear out unless the papers, which include the certificate of registry, are produced by the master to the custom house officer. [*Williams J.*

1861.

WILEY
v.
CRAWFORD.

(a) 1 E. & E. 309.

1861.

 WILEY
 v.
 CRAWFORD.

Might not the prohibition, in this Act and in the earlier Acts, of the use of the certificate for anything but the lawful navigation of the ship, mean a prohibition of its being used for the navigation of any other ship? It would hardly be possible so to use it, looking at the contents of the certificate. The object of the prohibition, which is unqualified in any way, was to prevent navigation being hindered, and the interests of the public damaged, by any detention whatever of the certificate which would prevent the ship from sailing. And this was the policy of the earlier statutes, which stat. 17 & 18 *Vict. c. 104.* was passed to "amend and consolidate." But in those Acts, 4 *G. 4. c. 41. s. 19.*, 6 *G. 4. c. 110. s. 21.*, 3 & 4 *W. 4. c. 55. s. 20.* and 8 & 9 *Vict. c. 89. s. 23.*, that policy was carried out by an enactment that the master and owners should give a bond to the Crown, conditioned that the certificate should not be sold, lent, or otherwise disposed of, but made use of solely for the service of the ship. Sect. 50 of stat. 17 & 18 *Vict. c. 104.* gives two remedies for the detention of the certificate: first, by implication, an action at law; secondly, in express words, a complaint before justices, if the certificate be detained without reasonable cause. [*Williams J.* That construction does not accord with that put upon the earlier Act, 8 & 9 *Vict. c. 89.*, by Vice-Chancellor *Wood* in *Clarke v. Batters* (a), and which he seems to rest upon the decision in *Bowen v. Fox* (b) as to the construction of stat. 4 *G. 4. c. 41. s. 25.*] It is difficult to reconcile that construction with the provision as to the bond. [*Williams J.* Stat. 8 & 9 *Vict. c. 89. s. 30.* recites that "it is not proper that any person under any pretence whatever," should detain the certifi-

(a) 1 *K. & J.* 242.(b) 10 *B. & C.* 41.

cate, or hold it "for any purpose other than the lawful use and navigation of the ship;" yet the remedy for the detention is given only when it is *wilful*. The same observation applies to stat. 4 G. 4. c. 41. s. 25.] It is probable that sect. 50 of stat. 17 & 18 Vict. c. 104. was framed to meet the decision in *Bowen v. Fox (a)*, which shewed that the enactment did not carry out the policy intimated by the recital. The words, in sect. 50, "unless it is proved to the satisfaction of such justice or Court that there was reasonable cause for such refusal," apply only to the case of proceedings before justices &c. But, if the defendants contend that those words can be imported into the earlier part of the section, so that it is necessary, in an action at law, to shew absence of reasonable cause, they ought to have gone to the jury. [*Williams J.* Sect. 52, which makes it a misdemeanor in the master or owner to use, or attempt to use, for the navigation of the ship "a certificate of registry not legally granted in respect of such ship," seems to favour the view which I suggested, that the condition in the bond, under the earlier statutes, was intended to prevent the certificate being used for any other ship than that for which it was granted.]

1861.

WILEY
v.
CRAWFORD.

T. Jones, in reply. In *Clarke v. Batters (b)* the party depositing the certificate was sole owner: and, looking at that fact, Vice Chancellor *Wood* must be taken to have laid down only this, that stat. 8 & 9 Vict. c. 89. did not prohibit the sole owner of a ship creating a charge on it by depositing the certificate. That decision (independently of the fact that it did not turn upon the

(a) 10 B. & C. 41.

(b) 1 K. & J. 242.

1861.

WILEY
v.
CRAWFORD.

construction of the statute now in question) does not shew that when the deposit has been made by the captain and part owner, he can, in his character of captain only, claim it back, as being entitled to it for the purposes of navigation. Sect. 50 does not provide for the application of the penalty. [*Byles J.* The application of the penalty, under sect. 524, by way of compensation is not obligatory upon the justices.] It is not. But if the penalty be so applied, the owner would, if his action at law lies, recover double compensation; which clearly was not the object of the Legislature.

Cur. adv. vult.

WILLIAMS J. now delivered the judgment of the Court.

This case turns on the construction of the first sentence in sect. 50 of stat. 17 & 18 *Vict. c. 104*.

We are not without doubt whether the Act by the introductory portion of the section, viz. "the certificate shall be used only for the lawful navigation of the ship," meant any thing more than to state a good reason for the enactment which immediately follows, viz. "the ship shall not be subject to detention by reason of any title, lien, charge or interest whatsoever which the owner, mortgagee or other person may have or claim to have on or in the ship described in such certificate." Nor can we accede to the argument that this sentence in sect. 50 was intended as a substitute for the portion of the condition of the bond required to be given to the Crown by the former Acts, but not by the present Act which provided that the certificate should not be sold, lent, or otherwise disposed of, but solely made use of

the service of the ship for which it was granted. For it appears to us that the object of the bond was to prevent an abuse of the certificate, by employing it for the purposes of some ship for which it was not granted: and that this object is sought to be attained, in the present statute, by the penal enactments of the 52nd; and 53rd sections, in lieu of the bond.

The construction, however, which the Court of Queen's Bench has put on the part of the section in question is, that it was intended to be a direct and independent prohibition of any dealing with the certificate for any other purpose than the navigation of the ship; and that, as this prohibition must necessarily include such a pledge of the certificate as was relied on for the defence in this case, the pledge was illegal and void, and could not afford any justification for the refusal to give up the instrument.

Notwithstanding the doubt we have above expressed, we cannot say we are satisfied that the Court of Queen's Bench was wrong in this view; and therefore we think the judgment ought to be affirmed.

Judgment affirmed.

1861.

WILEY
V.
CRAWFORD.

1861.

Thursday,
May 9th.

LEE *against* GRIFFIN.

*Statute of
Frauds.
Goods sold
and delivered.
Work and
labour.*

1. A contract to make a set of artificial teeth is a contract for the sale of goods, wares or merchandizes, within the 17th section of the Statute of Frauds, 29 Car. 2. c. 3.

2. *A.* ordered of *B.* a set of artificial teeth, which were by the terms of the contract to be fitted to her mouth; before they were so fitted *A.* died. Held, that *B.* could not sue *A.*'s executor in an action for work and labour done, and materials provided for his testatrix.

3. In that case, as soon as the teeth were ready, *B.* wrote to requesting her to appoint a day when he could see her for the purpose of fitting them, to which she replied as follows:—"My dear Sir. I regret after your kind effort to oblige me, my health will prevent my taking advantage of the early day. I fear I may not be able for some days. Yours &c." Held, that there was no sufficient memorandum of a contract within the meaning of that section.

4. Per *Crompton* and *Blackburn JJ.* In order to decide whether a contract be for work and labour, or for the sale of a chattel, the value of the skill and labour, as compared with that of the material supplied, is not a criterion.

DECLARATION against the defendant, as executor of one *Frances P.*, for goods bargained and sold, goods sold and delivered, and for work and labour done and materials provided by the plaintiff as a surgeon-dentist for the said *Frances P.*

Plea. That the said *Frances P.* never was indebted as alleged.

The action was brought to recover the sum of 21*l.* for two sets of artificial teeth ordered by the deceased.

At the trial, before *Crompton J.*, at the Sittings of the *Middlesex* after *Michaelmas* Term, 1860, it was proved by the plaintiff that he had, in pursuance of an order from the deceased, prepared a model of her mouth and made two sets of artificial teeth; as soon as they were ready he wrote a letter to the deceased, requesting her to appoint a day when he could see her for the purpose of fitting them.

of fitting them. To this communication the deceased replied as follows.

"My dear Sir. I regret, after your kind effort to oblige me, my health will prevent my taking advantage of the early day. I fear I may not be able for some days.

Yours &c. *Frances P.*"

Shortly after writing the above letter, *Frances P.* died. On these facts the defendant's counsel contended that the plaintiff ought to be nonsuited, on the ground that there was no evidence of a delivery and acceptance of the goods by the deceased, nor any memorandum in writing of a contract within the meaning of the 17th section of the Statute of Frauds, 29 *Car. 2. c. 8.*, and the learned Judge was of that opinion. The plaintiff's counsel then contended that, on the authority of *Clay v. Yates (a)*, the plaintiff could recover in the action on the count for work and labour done and materials provided. The learned Judge declined to nonsuit, and directed a verdict for the amount claimed to be entered for the plaintiff, with leave to the defendant to move to enter a nonsuit or verdict.

In *Hilary* Term following, a rule nisi having been obtained accordingly,

Patchett now shewed cause. 1. The principal question in this case is, whether the essence of the contract in the 2d count is in the work and labour, or in the materials that were found. The deceased, in truth, contracted for the skill of the dentist, and the materials are merely ancillary to the work and labour; *Clay v. Yates (a)*. [*Hill J.* The circumstances in *Clay v. Yates* are peculiar. It was a case of a printer employed to print a book. If I employ a man to print for me I

1861.

LEN
v.
GRIFFIN.

(a) 1 *H. & N.* 73.

1861.

 LEE
 v.
 GRIFFIN.

must give him something to print from, and he does his work with my materials; he also, to a certain extent, supplies his own materials, but they are only accessories. The present case is more like *Towers v. Osborne* (a) and other similar cases, which were decided on the Statute of Frauds, before the passing of Lord Tenterden's Act 9 G. 4. c. 14.] This case is not to be distinguished from that of an artist employed to paint a picture. In *Clay v. Yates* (b) Martin B. says, "Suppose an artist paints a portrait for 300 guineas, and supplies the canvas for worth 10s., surely he might recover under a count for work and labour," and Pollock C. B., in his judgment says, "In the case of a work of art, whether in gold, silver, marble or plaster, where the application of skill and labour is of the highest description, and the material is of no importance as compared with the labour, the price may be recovered as work, labour and materials. So here the ivory used in the work was of insignificant value compared to the skill employed. [*Blackburn v. Atkinson v. Bell* (c) is an express authority against you though the dictum of Bayley J. (d) that a plaintiff cannot maintain an action for work and labour, where the labour was bestowed on his own materials, is not law and has been dissented from in *Grafton v. Armitage* (e) and also in *Clay v. Yates* (f).]

2. If the plaintiff cannot recover on the count for work and labour, he can maintain his action on the count for goods bargained and sold. The letter written by the deceased is a sufficient memorandum of contract under the Statute of Frauds; *Ridgway v. Wharton* (g).

(a) 1 Str. 506.

(c) 8 B. & C. 277.

(e) 2 C. B. 336.

(b) 1 H. & N. 76.

(d) Pp. 283-4

(f) 1 H. & N. 73.

(g) 6 H. L. Ca. 238.

Griffis, in support of the rule, was not called upon to argue.

1861.

LEE
v.
GRIFFIN.

CROMPTON J. I think that this rule ought to be made absolute. On the second point I am of the same opinion as I was at the trial. There is not any sufficient memorandum in writing of a contract to satisfy the Statute of Frauds. The case decided in the House of Lords, to which reference has been made during the argument, is clearly distinguishable. That case only decided that if a document, which is silent as to the particulars of a contract, refers to another document which contains such particulars, parol evidence is admissible for the purpose of shewing what document is referred to. Assuming, in this case, that the two documents were sufficiently connected, still there would not be any sufficient evidence of the contract. The contract in question was to deliver some particular teeth to be made in a particular way, but these letters do not refer to any particular bargain, nor in any manner disclose its terms.

The main question which arose at the trial was, whether the contract in the second count could be treated as one for work and labour, or whether it was a contract for goods sold and delivered. The distinction between these two causes of action is sometimes very fine; but, where the contract is for a chattel to be made and delivered, it clearly is a contract for the sale of goods. There are some cases in which the supply of the materials is ancillary to the contract, as in the case of a printer supplying the paper on which a book is printed. In such a case an action might perhaps be brought for work and labour done, and materials provided, as it could hardly be said that the subject-matter of the contract

1861.

 LEE
 v.
 GRIFFIN.

was the sale of a chattel : perhaps it is more in the nature of a contract merely to exercise skill and labour. (*C*)
v. Yates (a) turned on its own peculiar circumstances. I entertain some doubt as to the correctness of the decision ; but I certainly do not agree to the proposition that the value of the skill and labour, as compared with that of the material supplied, is a criterion by which to decide whether the contract be for work and labour or for the sale of a chattel. Here, however, the subject-matter of the contract was the supply of goods. The case bears a strong resemblance to that of a tailor supplying a coat, the measurement of the mouth and fitting the teeth being analogous to the measurement and fitting of the garment.

HILL J. I am of the same opinion. I think the decision in *Clay v. Yates (a)* is perfectly right. That was not a case in which a party ordered a chattel from another which was afterwards to be made and delivered, but a case in which the subject-matter of the contract was the exercise of skill and labour. Wherever a contract is entered into for the manufacture of a chattel, there the subject-matter of the contract is the sale and delivery of the chattel, and the party supplying it cannot recover for work and labour. *Atkinson v. Bell (b)* is, in my opinion, good law, with the exception of the dictum of *Bayley J.*, which is repudiated by *Maule J.* in *Grafton v. Armitage (c)*, where he says : " In order to sustain a count for work and labour, it is not necessary that the work and labour should be performed upon materials that are the property of the plaintiff." *Tindal C. J.*, in his judgment in the same case, p.

(a) 1 H. & N. 73.

(b) 8 B. & C. 277.

(c) 2 C. B. 339.

points out that in the application of the observations of *Bayley J.* regard must be had to the particular facts of the case. In every other respect, therefore, the case of *Atkinson v. Bell* (a) is law. I think that these authorities are a complete answer to the point taken at the trial on behalf of the plaintiff.

1861.

LEE
v.
GRIFFIN.

When, however, the facts of this case are looked at, I cannot see how, wholly irrespective of the question arising under the Statute of Frauds, this action can be maintained. The contract entered into by the plaintiff with the deceased was to supply two sets of teeth, which were to be made for her and fitted to her mouth, and then to be paid for. Through no default on her part, she having died, they never were fitted: no action can therefore be brought by the plaintiff.

BLACKBURN J. On the second point, I am of opinion that the letter is not a sufficient memorandum in writing to take the case out of the Statute of Frauds.

On the other point, the question is whether the contract was one for the sale of goods or for work and labour. I think that in all cases, in order to ascertain whether the action ought to be brought for goods sold and delivered, or for work and labour done and materials provided, we must look at the particular contract entered into between the parties. If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labour; but, if the result of the contract is that the party has done work and labour which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. The case of an attorney employed

(a) 8 B. & C. 277.

1861.

 LEE
 v.
 GRIFFIN.

to prepare a deed is an illustration of this latter proposition. It cannot be said that the paper and ink used in the preparation of the deed are goods sold and delivered. The case of a printer printing a book would most probably fall within the same category. In *Atkinson v. Bell* (a) the contract, if carried out, would have resulted in the sale of a chattel. In *Grafton v. Armitage* (b) Tindal C. J. lays down this very principle. He draws a distinction between the cases of *Atkinson v. Bell* (a) and that before him. The reason he gives is that, in the former case, "the substance of the contract was goods to be sold and delivered by the one party to the other:" in the latter "there never was any intention to make anything that could properly become the subject of an action for goods sold and delivered." I think that distinction reconciles those two cases, and the decision of *Clay v. Yates* (c) is not inconsistent with them. In the present case the contract was to deliver a thing which, when completed, would have resulted in the sale of a chattel; in other words, the substance of the contract was for goods sold and delivered. I do not think that the test to apply in these cases is whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed to execute a work of art, greatly as his skill and labour, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel (d).

Rule absolute.

(a) 8 B. & C. 277.

(b) 2 C. B. 340.

(c) 1 H. & N. 73.

(d) Reported by H. Holroyd Esq.

CASES

1861.

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

TRINITY TERM,

XXIV. VICTORIA.

The Judges who usually sat in Banc in this
Term were:

COCKBURN C. J.

CROMPTON J.

WIGHTMAN J.

BLACKBURN J.

ROMELLIO *against* HALAGHAN.

Wednesday,
May 22d.

1. If a bill of exchange be substantially described in the schedule of a party who has taken the benefit of the Insolvent Debtors' Act, 1 & 2 Vict. c. 110., an unintentional mistake in the description, either of the bill or of the parties to it, will not prejudice the insolvent.

2. A bill of exchange for 45*l.*, dated 30th October 1858, had been drawn by an insolvent upon, and accepted by, A., but in his schedule the insolvent described the bill as drawn by A. and accepted by himself, and dated about November 1858. The insolvent being afterwards sued on this bill, pleaded his discharge under the Act, when the jury having found upon the evidence that the misdescription was by mistake: held, that the defendant was entitled to the verdict.

3. *Semhle*, per Crompton J. If an insolvent knows that a bill of exchange on which he is liable has been indorsed over to some person unknown, it is better for him to say so in his schedule.

Discharge under Insolvent Debtors Act, 1 & 2 Vict. c. 110.

Misdescription in schedule of bill of exchange.

THIS was an action on a bill of exchange for 45*l.*, dated 30th October, 1858, payable six months after date,

1861.
 ROMELLIO
 v.
 HALAGHAN.

drawn by the defendant on, and accepted by, *Standish O'Grady*, indorsed by the defendant to *R. A. Worman*, and by him to the plaintiff. The defendant pleaded his discharge under the Insolvent Debtors' Act, 1 & 2 Vict. c. 110.

At the trial, before *Wightman J.*, at the *Middlesex* Sitings in *Easter* Term of 1860, it appeared that the defendant had taken the benefit of the Insolvent Debtors Act, on which occasion he described in his schedule the bill in question, and the debt on which it was founded, as follows :—

Name &c. of Creditor.	Amount.	When contracted.	Admitted or disputed.	Nature and consideration of the debt and securities, if any; also if the debt is disputed, the reason thereof.
Mr. <i>Worman</i> , 129, <i>Sloane</i> <i>Street</i> , <i>Chelsea</i> . Attorney's clerk, Creditor, No. 24.	£116 and costs.	1858 1859	Admitted.	Balance for money borrowed in various sums from about <i>April</i> 1858 to <i>February</i> 1859. I gave him the following bills of exchange, namely, 45 <i>l.</i> drawn by <i>Standish O'Grady</i> , of 15, <i>Walcot Place West</i> , <i>Kennington Road</i> , clerk to the <i>Whitehall</i> Poor Law Board (for my use), and accepted by me, dated about <i>November</i> 1858, at six months. (Here followed the other bills.)

There was no other bill between these parties. The plaintiff, with the view of shewing that, at the time of signing his schedule, the defendant knew the bill was not in the hands of *Worman*, but of the plaintiff, gave evidence that notice of dishonour had been sent by him to the defendant by post; and a letter from *Worman* to the defendant was produced, stating that he had received notice of dishonour of the bill from a large firm in the city. *Worman* was also examined as a witness, and said that in that letter he mentioned the large house in the city as a matter of form. The defendant, on the other hand, deposed that at the time in question he had not received the notice of dishonour, and did not know where the bill was. The jury disbelieved the evidence

adduced by the plaintiff, and returned a verdict for the defendant, saying that they believed the misdescription of the bill in the schedule to have been by mistake; and leave was reserved to the plaintiff to move to enter a verdict on the question whether the bill was sufficiently described in the schedule of the defendant, so as to bar the plaintiff from bringing this action.

1861.

ROMELLIO
v.
HALAGHAN.

H. T. Cole, in the same term, obtained a rule nisi accordingly.

Doodeswell shewed cause. This case turns on certain sections of the Insolvent Debtors Act, 1 & 2 *Vict.* c. 110.

Sect. 69. "Every prisoner whose estate shall, by an order to be made under this act, be vested in the provisional assignee of the said Court for the Relief of Insolvent Debtors (whether upon his own petition or on the petition of any such creditor as aforesaid), shall, within the space of fourteen days next after such order shall have been made, or next after notice in writing of such order having been made shall have been given to him, in case such order shall not have been made on his own petition, or within such further time as the said Court shall think reasonable, deliver in to the said Court a schedule, containing a full and fair description of such prisoner, as to his name or names, trade or trades, profession or professions, together with the last usual place of abode of such prisoner, and the place or places where he has resided during the time when his debts were contracted; and also a full and true description of all debts due or growing due from such prisoner at the time of making such order, and of all and every person and persons to

1861.
ROMELLIO
v.
HALAGHAN.

whom such prisoner shall be indebted, or who to his knowledge or belief shall claim to be his creditors, together with the nature and amount of such debts and claims respectively, distinguishing such as shall be admitted from such as shall be disputed by such prisoner &c.;" "and the said schedule shall be subscribed by such prisoner, and shall forthwith be filed in the said Court, together with all books, papers, deeds, and writings in any way relating to such prisoner's estate or effects, in his or her possession, or under his or her custody or control."

Sect. 75. "After such examination of any such prisoner as hereinbefore directed it shall be lawful at such hearing or adjourned hearing as aforesaid for the said Court or commissioner or justices, upon such prisoner's swearing to the truth of his schedule, and executing such warrant of attorney as is hereinafter directed, to adjudge that such prisoner shall be discharged from custody, and entitled to the benefit of this Act, at such time as the said Court, or commissioner, or justices shall direct, in pursuance of the provisions hereinafter contained in that behalf, as to the several debts and sums of money due or claimed to be due at the time of making such vesting order as aforesaid from such prisoner to the several persons named in his schedule as creditors, or claiming to be creditors, for the same respectively, or for which such persons shall have given credit to such prisoner before the time of making such vesting order as aforesaid, and which were not then payable, and as to the claims of all other persons, not known to such prisoner at the time of such adjudication, who may be indorsees or holders of any negotiable security set forth in such schedule so sworn to as aforesaid."

The statute would be a nullity if objections like the present were allowed to prevail. Parties who pass the Insolvent Debtors Court do not keep copies of the instruments which they are bound to describe in their schedules; so that extreme accuracy in the description of those documents cannot there be required. The only authority in point on this subject is *Nias v. Nicholson* (a). There an insolvent, in his schedule, described a bill as drawn by himself on *M.* and then in the hands of *D.*, which had in reality been drawn by *M.* on the insolvent, and indorsed over by *D.* to *W.* Lord *Tenterden*, C. J., in summing up to the jury, said, "As in the case of bills, they may be indorsed over without his" (the insolvent's) "knowledge, and therefore he may not know the actual holders, it is sufficient that he describe the bill so as to shew what bill it is, and through whom it has passed." * * * "I shall leave the case to you in this way,—if you think that the bill mentioned in the schedule is intended and meant for this same bill, and that the misdescription is a mistake and not intended to deceive any one then the verdict ought to be for the defendant; but if you think that this was not the bill meant, or that if it was the bill meant, the change in the description was made to deceive or defraud any one, then the verdict should be for the plaintiff." (He was then stopped, the Court saying that they were not aware of the finding of the jury when they granted the rule.)

1861.

 ROMELLIO
 v.
 HALAGHAN.

Hawkins and *H. T. Cole*, in support of the rule. 1. The letter and evidence of *Worman* shew that he was wrongly described in the defendant's schedule as holder of this bill of exchange, and that the plaintiff ought to have

(a) 2 C. & P. 120.

1861.
 ROMELLIO
 v.
 HALAGHAN.

been described as the holder of it. At least the evidence establishes that the defendant was aware that the bill was indorsed over by *Worman* to some person unknown. [*Wightman J.* *Worman* says, in his letter, that he received notice of dishonour of it from "a large firm in the city." That could not mean the plaintiff. He also said that he only put that in his letter as matter of form.] In *Beck v. Beverly* (a) *Parke B.* says: "The proper course is to insert the holder's name in the schedule, or to state that he is not known; otherwise it is no discharge against the holder." [*Crompton J.* The judgment of Lord *Campbell C. J.* in *Booth v. Coldman* (b) seems to shew that those remarks of *Parke B.* only mean that the party shall give as full a disclosure as he can.

2. The original parties to this bill of exchange are misdescribed in the schedule; the drawer being erroneously stated to be the acceptor, and the acceptor the drawer. Sect. 93 of the statute excuses the insolvent if he misstates the amount of a debt, claim, or balance; but no other misdescription is excused. [*Wightman J.* It must always be a question of degree. If extreme accuracy were required, the omission of a letter would be fatal.] *Nias v. Nicholson* was not decided on this statute, but on the old Act, 1 G. 4. c. 119. s. 6. [*Blackburn J.* There is no material difference in the language of the two statutes.] In *Kemp v. Hurry* (c) the defendant had accepted a bill for 26*l.* 7*s.* 6*d.*, drawn by *W.*, as a renewal of a bill accepted by the defendant's partner. The defendant petitioned the Insolvent Debtors Court and named in his schedule as creditors the representatives of *W.*, who was dead, with this description, "Amou

(a) 11 M. & W. 845, 848.

(b) 1 E. & E. 414.

(c) 11 Exch. 47.

of debt 30*l*. These creditors hold a bill of exchange drawn by self and partner, and afterwards renewed by self." It was held that the bill was not properly described in the schedule. In delivering the judgment of the Court *Platt B.* said: "There is nothing on the face of this description which would enable any one reasonably to say that the bill on which this action is brought is set forth in the schedule." *Martin B.* added: "In reality, all that is mentioned in the schedule respecting this bill is, that it is a renewal, and afterwards renewed by self. To hold such a description sufficient would be to substitute a verbal statement for a written document." *Nias v. Nicholson (a)* was cited in that case. [*Wightman J.* In *Kemp v. Hurry (b)* there was a mistake in the amount: moreover, the bill was not described as accepted by any one.] In *Lambert v. Smith (c)* the action was upon a bill accepted by the defendant, payable to the plaintiffs or order; and the defendant, having in his schedule stated the name of his original creditor and described the debt, added, "I gave my acceptance to a bill drawn by him 16th February, 1849, at thirty-five days," it was held that the plaintiffs, not being named as holders, the defendant was not discharged as to their claim upon the bill. [*Blackburn J.* That case was decided on the authority of *Pugh v. Hookham (d)*, which does not bear it out.] [They also cited *Symons v. May (e)*, under the *Indian Insolvent Debtors Act*, 11 & 12 *Vict. c. 21.*, *Franklin v. Beesley (f)* and *Bircham v. Walker (g)*.]

1861.

ROMELLIO
v.
HALAGHAN.

(a) 2 C. & P. 120.

(c) 11 C. B. 358.

(e) 6 *Exch.* 707.(b) 11 *Exch.* 47.

(d) 5 C. & P. 376.

(f) 1 E. & E. 425.

(g) 1 L. T. N. S. 191.

1861.

ROMELLIO
v.
HALAGHAN.

COCKBURN C. J. Two objections are taken to the description of this bill of exchange in the schedule filed by the defendant when passing through the Insolvent Debtors Court, by reason of which it is contended that the plaintiff can still recover on the bill. One is that the bill is incorrectly described, in this, that it is described as a bill "accepted by the defendant," and "drawn by Standish O'Grady," whereas in fact it was "drawn" by the defendant and "accepted" by O'Grady. The second objection is that a person of the name Worman is described as indorsee and holder of the bill, whereas in fact it had been made over to the plaintiff by indorsement.

As to the first objection, this case is governed by the ruling in *Nias v. Nicholson* (a). That case, although only a *Nisi Prius* decision, was adopted by the profession as sound doctrine; it has been considered good law ever since; and is, I think, founded on a substantial basis. The Insolvent Debtors Act requires, as a condition of exoneration from a debt, that the party shall give "a full and true description" of it. But these words must receive a reasonable interpretation; thus, for instance, a mere inaccuracy in the description, unaccompanied by any intent to deceive, and not calculated to deceive, will not vitiate it.

The result and effect of the cases on this subject are truly stated by my brother *Byles* in his well known book on *Bills of Exchange*, p. 415 (7th ed.), and his conclusions are perfectly consistent with reason. He says, "If the bill be substantially described in the schedule, an unintentional mistake in the description

(a) 2 C. & P. 120.

either of the bill or of the parties to it, will not prejudice the insolvent." *Nias v. Nicholson (a)*, as I have said, governs this case. All the cases referred to in the argument by the plaintiff's counsel are distinguishable from that case. None of them have gone the length of overruling it, or (as I think) impeaching the soundness of the doctrine contained in it. There is therefore nothing in the first objection.

Then it is said the plaintiff was holder of this bill, and should have been so described by the defendant in the schedule. If it were known to the defendant that the bill, which the schedule describes as being in the hands of *Worman* as holder, was in the hands of the plaintiff, the objection would have been well founded. But that is not the case here: at all events, whether the defendant was aware of that fact would be a question for the jury. The statute only requires that a man who is describing debts which he owes shall describe the persons whom he knows or believes to be his creditors. If he has given a bill of exchange to *A.*, which is indorsed to *B.*, but the insolvent does not know that, and has no reason to believe that such was the case, he is not to lose the benefit of the Act on that account.

It is true that in this case there is some evidence of notice by *Worman* to the defendant that the bill was in the hands of a mercantile firm in the city. But, on the other hand, *Worman* admitted in evidence that, when he sent that notice to the defendant, it was not meant as a reality, but as a matter of form, in order, it would seem, to stimulate the defendant to take up the bill; in other words that it was a mere delusion. Possibly it may have been so taken by the defendant; and

1861.

ROMELLIO
v.
HALAGHAN.

(a) 2 C. & P. 120.

1861.
 ROMELLIO
 v.
 HALAGHAN.

I cannot blame him for looking at it as a piece of form, when such is the account given of it by *Worman* himself. At all events the question was one of fact for the jury; and, if the point had been made, it would have been left to them to say whether such was the belief of the insolvent at the time he signed his schedule, i. e. whether he *believed* at that time that the bill had got into the hands of another holder. That was not left to the jury, nor was it asked to be left to them, and we cannot assume the fact against the defendant, especially as we think that, if that question had been left to the jury, they would have found in his favour. The second ground of objection, therefore, also fails, and this rule must be discharged.

WIGHTMAN J. I am entirely of the same opinion on both points, and for the reasons given by my Lord Chief Justice. If the defendant had adopted, in his schedule the description of this bill suggested by *Worman*, there might have been ground for calling it a misdescription.

CROMPTON J. I am of the same opinion. On the first point we ought to be governed by *Nias v. Nicholson* (a) and I think the way in which my brother *Byles* lays down the law on this subject in his Treatise on *Law of Bills of Exchange* (p. 415, 7th ed.) is right. I think this bill was substantially described according to the principle laid down by Lord *Tenterden* C. J. in *Nias v. Nicholson* (a),—that the defendant was entitled to his discharge unless the jury thought the description likely to mislead. The case is put before us plainly on the ground that this is such a misdescription as vitiates the

(a) 2 C. & P. 120.

discharge, but we must remember that that case was decided thirty five years ago, and has been acted on by the profession ever since; and, I must conclude, was not intended to be overruled by the legislature in the subsequent enactments on this subject. I have a strong impression that, when the law is settled in a particular way by decisions of the Courts, the legislature must be supposed to have adopted the law as so settled if they afterwards use the same words in an enactment. We, therefore, ought not to interfere with that case, which is very good sense. And I agree with my brother *Wightman*, that if the defendant had adopted the description suggested by *Worman* it would have been a misdescription.

As to the point how the defendant ought to have acted if he had knowledge of subsequent indorsements of the bill, but not of the names of the indorsees, we need not decide that in this case; for the defendant did not know that the bill was indorsed over. Looking at the language of sect. 69, it may be that, where there are unknown creditors it would be better for the insolvent to say so in his schedule; but whether he is bound to say so is another question.

BLACKBURN J. I am of the same opinion, and for the same reasons.

Rule discharged.

1861.

ROMELLIO
V.
HALAGHAN.

1861.

Friday,
May 24th.

Evidence.
Proof of
agency.

MOODY *against* The LONDON, BRIGHTON and SOUTH COAST Railway Company.

In an action against a railway Company to recover a piece of superfluous land which the Company were bound to dispose of within ten years after it had been acquired by them, the plaintiff proposed to shew that, thirteen years after that time, the Company put the land up for sale by public auction as superfluous land. In order to prove this, the auctioneer was called as a witness, who deposed that he had received his instructions for the sale from one of the directors of the Company, and also from a person who had acted as their solicitor on former sales of land: held, that this was not even *prima facie* proof that the sale was by the authority of the Company; although more than twelve months had elapsed between the sale and the trial.

EJECTMENT, brought 7th June 1860, to recover a small piece of land adjoining the line of the old Croydon and Epsom Railway.

At the trial, before Blackburn J., at the Surrey Summer Assizes of 1860, it appeared that, on the 29th July 1844, *The Croydon and Epsom Railway Company* was incorporated by statute 7 & 8 Vict. c. xcii., which contained the following provisions (analogous to sect. 127 of the Lands Clauses Consolidation Act, 1845 & 8 & 9 Vict. c. 18.).

Sect. 216. "And for the purpose of making provision respecting the sale of lands acquired by the Company under the provisions of this Act, but which shall not be required for the purposes thereof, be it enacted, that the Company shall sell all such superfluous lands in such manner as they may deem most advantageous, and convey the same to the purchasers thereof by deed under the common seal of the Company, and a receipt under such common seal shall be a sufficient discharge

to the purchaser of any such lands for the purchase money in such receipt expressed to be received; and such sales and conveyances shall take place within ten years after the passing of this Act."

Sect. 217. "And be it enacted, that if the Company do not sell such superfluous lands within the period aforesaid, then such lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same."

By stat. 9 & 10 *Vict. c. cclxxxiii.*, passed 27th *July* 1846, *The Croydon and Epsom Railway Company*, and some other companies, were consolidated under the name of *The London, Brighton and South Coast Railway Company*. The land in question was acquired by the Company in 1846, and the plaintiff, who was entitled as trustee for some other parties to a strip of land running by the side of it, claimed this land as superfluous land, unsold within ten years, as required by the Act.

In order to prove that the land had not been disposed of within that time, the plaintiff, besides other evidence, proposed to shew that in *June* 1859 the Company had put up this and other lands for sale by public auction, as superfluous lands; and for this purpose called Mr. *Fuller*, an auctioneer, to prove the conditions of sale on that occasion, which stated the intended sale to be by the Company. Mr. *Fuller* deposed that he received instructions for that sale from a Mr. *Scott*, who was a director of the Company, and also from a Mr. *Faithful*, who, on the occasion of former sales, had acted as solicitor of the Company, and was present at the sale in question.

1861.

MOODY
v.
LONDON
and
BRIGHTON
Railway
Company.

1861.

Moss
v.
London
and
Birmingham
Railway
Company.

He was also present at the trial defending the action for the Company, but was not called as a witness. On this evidence it was objected that there was no sufficient proof of authority given by the Company to sell the land, but the learned Judge ruled there was prima facie evidence of it. The case then proceeded, and a verdict was returned for the plaintiff, with leave to the defendants to move to enter a nonsuit on another point, which it is unnecessary to refer.

Bovill, in *Michaelmas* Term 1860, obtained a rule on the point reserved, and also for a new trial, on the ground that the above evidence had been improperly received.

Lusk and *Garth* shewed cause. There was reasonable evidence that this sale was by the authority of the defendants. Whatever would operate to induce belief in the mind of a reasonable man is admissible as evidence. [*Cockburn* C. J. That proposition is very broad. I wish the law were so.] A Company, being an unsubstantial thing, can only act through the agency of others; and companies usually act by their officers or one of their body, for which purpose no corporate act is necessary. Mr. *Scott* was in the position of a tenant of land acting for his co-tenant, or a trustee acting for his cestui que trust. [*Wightman* J. Those cases are different from this. It has been held that a declaration or admission by a private member of a corporation is not evidence against the body (a).] As to Mr. *Faithful*. He acted as solicitor to the

(a) See acc. 3 *Stark. Ev.* 798, 3d ed.; *Mayor of London v. Cumph.* 22, 24.

pany on other occasions, and the fact of a person acting in a given capacity is evidence of his having been authorized to do so. [*Cockburn C. J.* That is in matters of a public nature. Would it be sufficient *primâ facie* evidence against the Company, in an action by *Fuller* for work and labour in effecting this sale, that on former occasions they had employed the solicitor who gave him his instructions on the present occasion?] Perhaps not; but this sale was public and notorious. [*Cockburn C. J.* "Notorious" is a dangerous word (a).] Even if the Court should think this evidence, strictly speaking, inadmissible, it ought, in the exercise of its discretion, to refuse a new trial, as there was ample evidence of authority without it. [*Cockburn C. J.* You might easily have supplied the necessary evidence by asking for an adjournment.]

1861.

MOODY
v.
LONDON
and
BRIGHTON
Railway
Company.

Bovill and *Denman*, in support of the rule, were stopped by the Court.

COCKBURN C. J. This rule must be made absolute for a new trial, on the ground that these conditions of sale were improperly received in evidence. I very much regret this, because no moral doubt whatever can be entertained of the fact of Mr. *Fuller* having put them forth by the authority of the Company. But because the moral proof of a matter is convincing and conclusive, we must not on that account lose sight of those principles by which the sufficiency of legal proof is governed.

Here all turns on the question whether Mr. *Fuller*,

(a) In *H. 7 Ed. 3. 4 A.*, pl. 7, *Herle C. J.* says, "Nous ne poiomous pas aler a jugement sur notorie chose, eins selonque ce que le proces est devant nous mesmes."

1861.

MOODY
v.
LONDON
and
BRIGHTON
Railway
Company.

when he put forth these conditions, had the authority of the Company for so doing. The only proof of that was that he received his instructions from a director of the Company, and from another person who usually acted as solicitor of the Company. Now it does not follow that because Mr. *Scott* acted in this matter as director of the Company, he had authority to do so from the corporate body of which he was only an individual member. With respect to the solicitor, Mr. *Faithful*—although it was shewn that he had acted for the Company on the occasion of former sales, a circumstance which morally would go far to satisfy us of his having had authority to do so in the present instance, it does not establish the proposition in a legal point of view. There is an obvious distinction between a general authority and an authority relating to a particular transaction (many instances of agency might be referred to in proof of this). A man employs a solicitor, and even calls him his solicitor, but that does not give that person authority to bind him in a particular instance. Here nothing was proved except that, on other occasions, Mr. *Faithful* acted as solicitor of the Company. But, to enable him to bind the Company as to this particular sale, he would have required an express authority in the particular case, and it was not because he had acted on former occasions that we can legally infer that he had the slightest authority to sell these lands. The position of a solicitor in such cases is too clear to require further illustration, and it can make no difference whether he is acting for a company, or for an individual. Then, as Mr. *Fuller's* authority was derived from Mr. *Scott* and Mr. *Faithful*, there was no *prima facie* proof of agency for the Company which called for an answer.

At one time during the argument I was disposed to think that, as twelve months had elapsed between the sale and the trial, the fact of the transaction having been undisturbed during that time might be a ground for inferring that it had come to the knowledge of the Company, and that they must be taken to have acquiesced in it. But, on further consideration, I am satisfied that this would be going too far. In the absence of evidence of the purchase money having been received by them, or of a conveyance having been drawn up, or any thing respecting the transaction having come to their knowledge, we should not be justified in drawing such an inference.

As I have already said, I come to this conclusion with great regret; for the evidence in question was either superfluous, or, if necessary, the deficient portion of it could have been completed with little extra trouble. It is important, however, that we abide by the principles and rules which have been hitherto maintained as to the sufficiency of legal proof.

It will therefore be unnecessary to say anything on the other matter, which must now be left to be settled on some future occasion.

WIGHTMAN and BLACKBURN JJ. concurred.

CBOMPTON J. had left the Court.

Rule absolute for a new trial.

1861.

MOODY
v.
LONDON
and
BRIGHTON
Railway
Company.

1861.

*Saturday,
May 25th.*

ADELINA HEYS against EDWIN JAMES TINDAL

*Duty of house
agent.
Introducing
insolvent
tenant.*

The plaintiff employed the defendant as house agent to let a house for her on commission. In an action for introducing an insolvent tenant: held, that it was properly left to the jury upon the evidence to say whether it was part of the defendant's retainer to make reasonable inquiries as to the eligibility of the tenant.

THE declaration stated that in consideration that the plaintiff, at the request of the defendant, employed him as her house agent for the purpose of letting or procuring for the plaintiff a tenant for a certain furnished house and premises of the plaintiff, for commission and reward to him the defendant, the defendant undertook and engaged with the plaintiff that he would use due care and attention as such house agent in and about the procuring such a tenant, and in and about ascertaining or endeavouring to ascertain, before letting the said house and premises to any person, whether introduced and recommended by him to the plaintiff, that such person was a fit, proper, respectable and solvent person to become tenant of the said house and premises. Yet the defendant did not use such due care and attention as such house agent, but introduced and recommended to the plaintiff as a tenant for the said house and premises one *T. E.*, and afterwards, as such house agent of the plaintiff, let the said house and premises to the said *T. E.* without using due care and attention in and about ascertaining or endeavouring to ascertain that he the said *T. E.* was such fit, proper, respectable and solvent person as aforesaid, and, on the contrary, well knowing (as the fact was) that the said *T. E.* was not a fit or proper person to become such tenant.

and was neither respectable nor solvent. Averment of special damage; &c.

1861.

HEYS
v.
TINDALL.

Pleas. 1. That the defendant did not undertake or engage as alleged. 2. That he did use such due care and attention as such house agent, according to his undertaking in that behalf.

Issues on the pleas.

On the trial, before *Blackburn, J.*, at the *London* Sittings after *Easter* Term, it appeared that the defendant, who was an auctioneer, called upon the plaintiff to know whether she would let the house mentioned in the declaration, and introduced *T. E.* to her as a tenant, and handed to her his references. The subsequent negotiations as to letting the house were conducted between the plaintiff and *T. E.*, and ended in his becoming her tenant. He paid the first quarter's rent only, and became insolvent. The defendant sent in an account to the plaintiff, charging five per cent. commission on letting the house and for collecting the first quarter's rent.

The learned Judge left two questions to the jury. First: Was it upon the evidence part of the defendant's employment, for which he was to earn commission, that he should make reasonable inquiries as to the eligibility of the tenant? And he directed them that if it was no part of the duty of the defendant to look into the references he was entitled to a verdict. But if they were of opinion that it was part of his duty to make reasonable inquiries as to the eligibility of the tenant, then they were to consider whether he had made those reasonable inquiries.

The jury said that, according to the retainer by the plaintiff, the defendant was bound to make reasonable

1861.

HEYS

v.

TINDALL.

inquiries as to the eligibility of the tenant, and that he had not made them ; and gave a verdict for the plaintiff damages 28*l.* 6*s.* 8*d.*

Petersdorff Serjt. moved for a rule calling upon the plaintiff to shew cause why there should not be a new trial on the ground that there was no evidence to go to the jury.—There was no evidence of any express bargain that the defendant would do more than be the medium of communication between the plaintiff and a tenant. And there is no implied undertaking, from the nature of the employment of a house agent, that he guarantees the solvency or eligibility of a tenant. His duty is simply to use reasonable care to introduce to the person who employs him a solvent or competent tenant. [*Cockburn* C. J. The house agent must use reasonable care and diligence in ascertaining the condition of a person before he introduces him to the landlord as a tenant. It cannot be supposed that the commission of five per cent. is to be paid for only putting the name of the owner and the particulars of the premises upon the house agent's books, without the information of those who may come to make inquiries at his office. *Crompton* J. When the owner of a house proposes to a house agent that he should find a tenant for him, it is meant that he should find a fit and proper tenant. *Wightman* J. What does the house agent receive in commission for, except for making inquiries as to the fitness of the tenant?] The house agent only introduces a tenant to the landlord : it is the duty of the landlord to make inquiries as to the respectability of the tenant. [*Crompton* J. If a broker introduces a notoriously bad customer to his employer, an action would lie for negligence. The jury may collect from the circumstances

what the undertaking of the defendant was. *Blackburn J.*
If an attorney is employed to procure a mortgage security
he undertakes to ascertain that the title is good and that
it is a sufficient security (a).]

1861.

HEYS
v.
TINDAL.

PER CURIAM. (COCKBURN C. J., WIGHTMAN, CROMP-
TON and HILL JJ.)

Rule refused.

(a) See *Hayne v. Rhodes*, 8 Q. B. 342.

CUSACK and others against ROBINSON.

Saturday,
May 25th.

1. In order to satisfy the Statute of Frauds, 29 Car. 2. c. 3. s. 17., there must be both an acceptance of the goods, or part of them, and an actual receipt of them.

2. In order to satisfy the same enactment it is not necessary that the acceptance of the goods should follow or be contemporaneous with the receipt of them; an acceptance prior to the receipt will suffice.

3. In an action for goods sold and delivered, it appeared that the defendant went to the plaintiffs at *Liverpool*, and said he wanted to buy from 150 to 200 firkins of butter. He then went with one of them to their cellar, where he was shewn a lot of 156 firkins, six of which he opened and inspected. Afterwards, on the same day, the plaintiffs and defendant made a verbal agreement, by which the defendant agreed to buy that specific lot at 77s. per cwt. When the price had been agreed on, the defendant took a card on which his name and address in *London* were written "*Edmund Robinson, 1, Wellington Street, London Bridge, London,*" and wrote on it "156 firkins butter to be delivered at *Fenning's Wharf, Tooley Street.*" He gave this to the plaintiffs, and at the same time said that his agents, Messrs. C., at *Liverpool*, would give directions how the goods were to be forwarded to *Fenning's Wharf*. The plaintiffs, by C.'s directions, delivered the butter to P.'s carts to be forwarded to the defendant at *Fenning's Wharf*. The plaintiff sent an invoice, dated the 25th October 1860, to the address on the defendant's card. He received in answer a letter purporting to come from a clerk in the defendant's office, acknowledging the receipt of the invoice, and stating that, on the defendant's return, he would no doubt attend to it. A clerk at *Fenning's Wharf* proved that Messrs. *Fennings* stored goods for their customers, and had a butter warehouse; that the defendant had used the warehouse for fifteen years, and was in the habit of keeping his butters there till he sold them. On the 26th October P. & Co. had delivered a part of the 156 firkins in question at the warehouse, and delivered the residue

Statute of
Frauds,
29 Car. 2. c. 3.
s. 17.
Acceptance
and receipt of
goods.

1861.

CUSACK

v.

ROBINSON.

afterwards. The witness could not say whether any one came to inspect them or not, but he proved that they were delivered up by *Fennell* to *P. & Co.* under a delivery order from the defendant, dated 27th October. Held that there was evidence of an acceptance and so receipt sufficient to satisfy the statute.

DECLARATION for goods sold and delivered, and goods bargained and sold. Plea, never indebted. At the trial, before *Blackburn J.*, at the *Liverpool* Winter Assizes in 1860, it appeared that the defendant, who was a *London* merchant, on the 24th October, 1860, *Liverpool*, called on the plaintiffs, who are importers of *Canadian* produce, and said he wanted to buy from 100 to 200 firkins of *Canadian* butter. He then went with one of the plaintiffs to their cellar, where he was shown a lot of 156 firkins of butter, "*Ex-Bohemian*," belonging to the plaintiffs, which he then had the opportunity of inspecting, and in fact he did open and inspect six of the firkins in that lot. After that examination, they went to another cellar to see other butter, which however did not suit the defendant. At a later period of the same day, the plaintiffs and the defendant made a verbal agreement, which the defendant agreed to buy that specific lot of 156 firkins, at 77s. per cwt. When the price had been agreed on, the defendant took a card on which his name and address in *London* were written "*Edmund Robinson*, 1, *Wellington Street, London Bridge, London*," and wrote on it "156 firkins butter to be delivered at *Fennell's Wharf, Tooley Street*." He gave this to the plaintiffs, and at the same time said that his agents, *Mr. Clibborn*, at *Liverpool*, would give directions how the goods were to be forwarded to *Fennell's Wharf*. The plaintiffs, by *Clibborn's* directions, delivered the butter in *Pickford's* carts to be forwarded to the defendant.

Fenning's Wharf. The plaintiffs sent an invoice, dated the 25th *October*, 1860, to the address on the defendant's card. They received in answer a letter purporting to come from a clerk in the defendant's office, acknowledging the receipt of the invoice, and stating that on the defendant's return he would no doubt attend to it. There was no evidence that the writer of this letter had any authority to sign a memorandum of a contract. On the 27th *October* the plaintiffs, in *Liverpool*, received a telegram from the defendant in *London*, in effect asserting that the butters had been sold by the plaintiffs subject to a warranty, that was equal to a sample, but that they were not equal to sample, and therefore would be returned. The plaintiffs replied by telegram that there was no such warranty, and they must be kept. A clerk at *Fenning's Wharf* proved that Messrs. *Fennings* stored goods for their customers, and had a butter warehouse; that the defendant had used the warehouse for fifteen years, and was in the habit of keeping his butters there till he sold them. On the 26th *October*, *Pickford & Co.* had delivered a part of the 156 firkins in question at the warehouse, and delivered the residue on the morning of the 27th *October*. The witness could not say whether any one came to inspect them or not, but he proved that they were delivered up by *Fenning* to *Pickford & Co.* under a delivery order from the defendant dated 27th *October*. The defendant's counsel admitted that it must be taken that the sale was not subject to any warranty; but objected that the price of the goods exceeded 10*l.*, and that there was nothing proved to satisfy the requisitions of the Statute of Frauds. The verdict was entered for the plaintiffs for 420*l.* 10*s.* 1*d.*,

1861.

 CUSACK
 v.
 ROBINSON.

1861.

 CUSACK
 v.
 ROBINSON.

with leave to the defendant to move to enter a nonsuit, if there was no evidence proper to be left to the jury either of a memorandum of the contract or of an acceptance and actual receipt of the goods.

In *Hilary* Term, 1861, *Edward James* obtained a rule nisi accordingly, citing *Nicholson v. Bower* (a): which rule was argued at the Sittings in banc after *Easter* Term, on the 9th *May*: before *Hill* and *Blackburn* JJ.

Mellish and *Quain* shewed cause. It must be conceded, on the part of the plaintiffs, that there was no memorandum of a contract in writing to satisfy the 17th section of the Statute of Frauds, 29 *Car. 2. c. 3.*, which enacts, "No contract for the sale of any goods, wares and merchandises, for the price of 10*l.* sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized." The card which the defendant delivered to the plaintiffs is insufficient for that purpose, as it does not contain the names of both parties to the contract, neither does it state the price at which the butter was to be sold.

But there is evidence of an acceptance and actual receipt of the goods within the meaning of the statute. A very important fact in the case is, that the sale was a sale of a specific lot of 156 firkins of butter, and also that there was a verbal contract for the sale of the butter which was

(a) 1 *E. & F.* 172.

valid at common law, and the vendee gave directions that it should be sent to him at *Fenning's Wharf*. As the defendant was in the habit of using *Fenning's Wharf* as his warehouse, his ordering certain specific goods to be taken there, and they being taken there by his direction, and warehoused in the manner goods received on his account were usually warehoused, vested the goods in his actual possession. If the goods are in the vendee's actual possession, then the vendor's right of lien for the price is destroyed. Suppose instead of directing the goods to *Fenning's Wharf*, the defendant had directed them to his own warehouse, surely that would have been ample evidence of an acceptance and actual receipt to satisfy the statute. There is a distinction between the cases of a purchase of specific goods, and of goods which are in bulk and not ascertained. Suppose a man goes into a shop and says, "I buy that chattel; send it to such a place, or give it to a porter," and afterwards receives it and exercises an act of dominion over it, he has done everything the statute requires to constitute an acceptance and receipt. At one time it was doubted whether, in order to satisfy this clause in the statute, the acceptance might not follow the delivery: but that doubt has been removed by *Morton v. Tibbett (a)*, where this Court decided that the acceptance must precede or be contemporaneous with the delivery. That case is also an authority to shew that the fact of the vendee having dealt with the goods as owner, is evidence of an acceptance and receipt. Here, after a contract respecting these goods, which was binding at common law, had been entered into, the defendant exercised an act of dominion over them by

1861.

 CUSACK
 V.
 ROBINSON.

(a) 15 Q. B. 428.

1861.

CUSACK
v.
ROBINSON.

ordering them to be sent to *Fenning's Wharf*, and to be warehoused there for him.

In *Elmore v. Stone* (a) the defendant purchased horses under a verbal agreement from the plaintiff, who desired the plaintiff, who was a livery stable keeper, to keep the horses at livery for him, which the plaintiff agreed to do. The Court of Common Pleas held that there was sufficient evidence of a delivery within the statute. *Chaplin v. Rogers* (b) decided that where a vendee, after a bargain and sale by parol, deals with goods as if they were in his actual possession, such an act of ownership is evidence of a receipt and acceptance by the vendee. In *Hart v. Bush* (c) this Court held that a delivery of goods by the vendor to a wharf appointed by the vendee, to be forwarded by any other person to the vendee, would not constitute an acceptance of a receipt under the statute; but that case is distinguished for two reasons, first that the sale was not one of specific goods, and next the direction given by the vendor was, that the goods were to be sent to the vendee by sea from a place called *Griffin's Wharf*. The facts were that they were forwarded from *Griffin's Wharf* in a ship selected by the wharfinger, and before they reached their destination.

Nicholson v. Bower (d), which was cited when this case was moved, will probably be relied on by the other side in that case the vendee purposely suspended the acceptance because he was in insolvent circumstances. *Meigh v. Meigh* (e) may perhaps also be relied on; but in that case the goods sold were not specific goods; the de-

(a) 1 Taunt. 458.

(b) 1 East, 192.

(c) 1 E. B. & E. 494.

(d) 1 E. & E. 17.

(e) 2 E. & B. 364.

them on board a ship selected by the vendor, therefore, could in no way amount to an acceptance and receipt by the vendee.

1861.

CUSACK
v.
ROBINSON.

Milward, in support of the rule. The defendant never exercised such an act of ownership over the goods as would constitute an acceptance and actual receipt within the meaning of the Statute of Frauds. In *Chaplin v. Rogers* (a) the vendee had sold the goods to a third person, which was an unequivocal act of dominion. It is true that, in the present case, the defendant ordered the goods to be sent to *Fenning's Wharf*; but all that can be inferred from that act is that the warehouse at *Fenning's Wharf* was the defendant's warehouse for the purpose of acceptance. *Hunt v. Hecht* (b) is an express authority that, unless the vendee has an opportunity of judging whether the goods sent correspond with those ordered, there can be no acceptance and receipt within the statute.

There is no distinction between specific goods and goods which are not ascertained. In *Baldey v. Parker* (c) the defendant bought certain goods, some of which were measured in his presence, some of which he marked with a pencil, and some of which he assisted in cutting from a larger bulk. Afterwards, when the goods were sent to his house, he refused to accept them; and the Court held that there was no acceptance and receipt to satisfy the statute. So, in *Farina v. Home* (d), the vendor's acceptance of a delivery warrant, given by a wharfinger with whom the goods had been warehoused, was held to be no evidence of a delivery and acceptance of goods.

(a) 1 *East*, 192.(b) 8 *Exch.* 814.(c) 2 *B. & C.* 37.(d) 16 *M. & W.* 119.

1861.

 CUSACK
 V.
 ROBINSON.

Whether there can be an acceptance before delivery of goods under this section of the Statute of Frauds was raised in *Saunders v. Topp* (a). In that case, however, it was not necessary to decide the question, because there was evidence of an acceptance after delivery; but the Judges of the Court of Exchequer seemed to be of opinion that there could not be an acceptance prior to the receipt. [*Hill J.* A bargain and sale between vendor and vendee—valid in all respects except for the Statute of Frauds; goods sent by vendor, under the direction of vendee, to warehouse-keeper selected and nominated by vendee; vendor parted with his lien, and the transitus at an end. Do these facts constitute an acceptance and actual receipt within the meaning of the 17th section of the Statute of Frauds?

Cur. adv. vult. (b).

The judgment of the Court was now delivered by

BLACKBURN J. (After fully stating the facts his lordship proceeded). It was not contended that there was any sufficient memorandum in writing in the present case: but it was contended that there was sufficient evidence that the defendant had accepted the goods sold and actually received the same; and, on consideration, we are of that opinion.

The words of the statute are express, that there must be an acceptance of the goods, or part of them, as well as an actual receipt; and the authorities are very numerous to shew that both these requisites must exist or else the statute is not satisfied. In the recent case

(a) 4 *Exch.* 390.

(b) The arguments in this case are reported by *H. Holroyd Esq.*

of *Nicholson v. Bower* (a), which was cited for the defendant, 141 quarters of wheat were sent by a railway, addressed to the vendees. They arrived at their destination, and were there warehoused by the railway Company under circumstances that might have been held to put an end to the unpaid vendor's rights. But the contract was not originally a sale of specific wheat, and the vendees had never agreed to take those particular quarters of wheat; on the contrary, it was shewn to be usual, before accepting wheat thus warehoused, to compare a sample of the wheat with the sample by which it was sold; and it appeared that the vendees, knowing that they were in embarrassed circumstances, purposely abstained from accepting the goods, and each of the Judges mentions that fact as the ground of their decision. In *Meredith v. Meigh* (b) the goods, which were not specified in the original contract, had been selected by the vendor, and put on board ship by the directions of the vendee, so that they were in the hands of a carrier to convey them from the vendor to the vendee. It was there held, in conformity with *Hanson v. Armitage* (c), that the carrier, though named by the vendee, had no authority to accept the goods. And in this we quite agree: for, though the selection of the goods by the vendor, and putting them in transit, would, but for the statute, have been a sufficient delivery to vest the property in the vendee; it could not be said that the selection by the vendor, or the receipt by the carrier, was an acceptance of those particular goods by the vendee.

In *Baldev v. Parker* (d), which was much relied

1861.

CUSACK
V.
ROBINSON.

(a) 1 E. & E. 172.

(b) 2 E. & B. 364.

(c) 5 B. & Ald. 557.

(d) 2 B. & C. 37.

1861.

 CUSACK
 v.
 ROBINSON.

on by Mr. *Milward* in arguing in support of this rule the ground of the decision was that pointed out by *Holroyd J.*, who says, p. 44: "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession; and therefore as long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute." The principle here laid down is that there cannot be an actual receipt by the vendee so long as the goods continue in the possession of the seller, as unpaid vendor, so as to preserve his lien; and it has been repeatedly recognised. Even though the goods remain in the personal possession of the vendor, yet, if it is agreed between the vendor and the vendee that the possession shall thenceforth be kept not as vendor but as bailee for the purchaser, the right of lien is gone, and then there is a sufficient receipt to satisfy the statute; *Marvin v. Wallis* (a), *Beaumont v. Brengeri* (b). In both of these cases the specific character of the goods sold was ascertained, and there appeared to have been some indication of acceptance subsequent to the agreement which changed the nature of the possession.

In the present case there was ample evidence that the goods, when placed in *Fenning's Wharf*, were under the control of the defendant to await his further directions, so as to put an end to any right of the plaintiffs as unpaid vendors, as much as the change in the nature of the possession did in the cases cited. There was also sufficient evidence that the defendant had at *Liverpool*, selected these specific 156 firkins of butter.

(a) 6 E. & B. 726.

(b) 5 C. B. 301.

those which he then agreed to take as his property as the goods sold, and that he directed those specific firkins to be sent to *London*. This was certainly evidence of an acceptance, and the only remaining question is, whether it is necessary that the acceptance should follow, or be contemporaneous with the receipt, or whether an acceptance before the receipt is not sufficient. In *Saunders v. Topp* (a), which is the case in which the facts approach nearest to the present case, the defendant had, according to the finding of the jury, agreed to buy from the plaintiff 45 couple of sheep which the defendant, the purchaser, had himself selected, and the plaintiff had by his directions put them in the defendant's field. Had the case stopped there, it would have been identical with the present. But there was, in addition, some evidence that the defendant, after seeing them in the field, counted them and said it was all right, and, as this was some evidence of an acceptance after the receipt, it became unnecessary to decide whether the acceptance under the statute must follow the delivery. *Parke B.*, from the report of his observations during the argument, seems to have attached much importance to the selection of particular sheep by the defendant, but in his judgment, he abstains from deciding on that ground, though certainly not expressing any opinion that the acceptance must be subsequent to the delivery. The other three Barons—*Alderson, Rolfe and Platt*—express an inclination of opinion that it is necessary, under the statute, that the acceptance should be subsequent to or contemporaneous with the receipt; but they expressly abstain from deciding on that ground. In the elaborate judgment of Lord Campbell in *Morton v. Tippet* (b); in

1861.

 CUSACK
 v.
 ROBINSON.
(a) 4 *Exch.* 390.(b) 15 *Q. B.* 428.

1861.

CURACK
v.
ROBINSON.

which the nature of an acceptance and actual receipt sufficient to satisfy the statute, is fully expounded; he says (p. 434), "The acceptance is to be something which is to precede, or at any rate to be contemporaneous with, the actual receipt of the goods, and is not to be a subsequent act after the goods have been actually received, weighed, measured or examined." The intention of the legislature seems to have been that the contract should not be good unless partially executed, and it is partially executed if, after the vendee has finally agreed on the specific articles which he is to take under the contract, the vendor, by the vendee's directions, parts with the possession, and puts them under the control of the vendee so as to put a complete end to all the rights of the unpaid vendor as such. We think, therefore, that there is nothing in the nature of the enactment to imply an intention, which the legislature has certainly not in terms expressed, that an acceptance prior to the receipt will not suffice. There is no decision putting this construction on the statute, and we do not think we ought so to construe it.

We are, therefore, of opinion that there was evidence in this case to satisfy the statute, and that the rule must be discharged.

Rule discharged.

1861.

The QUEEN *against* BOYES.Monday,
May 27th.

1. A pardon under the Great Seal takes away the privilege of a witness in not answering, so far as regards any risk of prosecution at the suit or in the name of the Crown.

2. The Act of Settlement, 12 & 13 W. 3. c. 2. s. 3., which enacts that no pardon under the Great Seal shall be pleadable in bar to an impeachment by the Commons in Parliament, renders a pardon under the Great Seal wholly inoperative to prevent impeachment by the House of Commons, and so getting rid of the judgment of the House of Lords; for that purpose a *subsequent* pardon must be granted by the Crown: per *Cockburn C. J., Crompton and Hill JJ.*; dubitante *Blackburn J.*

3. A merely remote and naked possibility of legal peril to a witness from answering a question is not sufficient to entitle him to the privilege of not answering. To entitle him to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which he is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. Moreover, the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.

4. The position, that the witness is sole judge as to whether his evidence would bring him into danger of the law, and that the statement of his belief to that effect, if not manifestly made *malâ fide*, should be received as conclusive, denied by this Court.

5. Still, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question.

6. On the trial of an information for bribery, filed by *The Attorney General* by the direction of the House of Commons, one of the persons charged in the information to have been bribed by the defendant was called as a witness; and, on his declining to answer any questions with respect to the alleged bribery, the counsel for the Crown handed him a pardon under the Great Seal; which the witness accepted, but still declined to answer: held, that the possible risk of impeachment by the House of Commons, notwithstanding the pardon under the Great Seal, according to the Act of Settlement, 12 & 13 W. 3. c. 2. s. 3., was not a sufficient ground to entitle him to the privilege of not answering.

7. The rule that the evidence of an accomplice requires corroboration is not a rule of *law*, but a rule of general and usual practice; the application of which is for the discretion of the Judge by whom the case is tried: and in the application of the rule much depends on the nature of the offence, and the extent of the complicity of the witness in it.

*Pardon.
Impeachment
by House of
Commons.
Act of Settlement,
12 & 13
W. 3. c. 2. s. 3.
Privilege of
witness in
not answering.
Questions
tending to
criminate.
Information
for bribery.
Corroboration
of accomplice.
Practice at
trial.*

1861.

THE QUEEN
v.
BOYES.

8. On the trial of an information for bribery at an election for members of Parliament for a borough, filed by *The Attorney General* by the direction of the House of Commons, the persons charged in the information to have been bribed by the defendant were examined as witnesses. It appeared from their evidence that on the day of the election the witnesses came to the front of the house which stood between and opened into two parallel streets of the borough, and went in succession into the house, and into a back room, in which the defendant was seated; after an interview with the defendant each of them passed into another room, in which another person was seated, from whom each received the sums mentioned in the information; they then passed into the other street, and so to the hustings, and voted. *Semble*, that these witnesses, if accomplices of the defendant at all, were not accomplices in such a sense as to require corroboration; and also that here was corroboration, if necessary.

9. On the trial of that information a witness who was called to prove the fact of his having received a bribe from the defendant, objected to give evidence on the ground that the effect of the evidence he was called upon to give would be to criminate himself. Thereupon the counsel for the Crown handed to the witness a pardon under the Great Seal, who accepted it. The witness, however, still objecting to give evidence, and the Judge entertaining doubts as to whether the witness could be properly compelled to answer, notwithstanding the pardon, an arrangement was come to between the counsel on both sides, with the sanction of the Judge, that the witness should be directed to answer, but that the opinion of this Court should be taken as to whether the privilege of the witness remained notwithstanding the pardon; the counsel for the Crown undertaking, in the event of this Court holding the affirmative, to enter a nolle prosequi, if the defendant should be convicted. The defendant having been convicted, this Court granted a rule to shew cause why a new trial should not be had; and, having heard it argued, discharged it, protesting against the course pursued at the trial being drawn into a precedent—as the Court was thereby called on to pronounce a judgment which it was without authority to enforce.

THIS was an information filed by *The Attorney General*, in pursuance of a resolution of the House of Commons. The first count stated that, on the 29th April 1859, at the borough of *Beverley*, in the county of *York*, an election was had for choosing two burgesses to serve in Parliament for the said borough; and that at the said election one *Ralph Walters* was a candidate and that before the said election was so had the defendant unlawfully, knowingly, wickedly and corruptly did give to one *John Best*, then being a voter, 1*l.* to induce him to vote at the said election for the said

Ralph Walters; against the form of the statute in such case made and provided, and against the peace &c. The second count stated that the defendant, whilst the said election was being had, gave to the said *John Best* 1*l.* to induce him to vote for *Ralph Walters*. The third count stated that the defendant, before the said election in the first count of this information mentioned was so had as therein mentioned, to wit, on the 29th day of *April* in the year aforesaid, unlawfully, knowingly, wickedly and corruptly did give to one *John Pougher*, then being a voter, 2*l.*, to induce him to vote at the said election for the said *Ralph Walters*; against the form of the statute in such case made and provided, and against the peace, &c. The fourth, fifth, sixth, seventh, eighth and ninth counts charged the defendant with giving other sums of 2*l.* and 1*l.* respectively to other voters to induce them to vote for *Ralph Walters*.

Plea: Not guilty.

On the trial, before *Martin B.*, at the *Yorkshire Summer Assizes* in 1860, *The Solicitor General*, in opening the case for the Crown, stated that the evidence upon which the case for the prosecution rested would be the evidence of the persons who had received the bribes, whom he should call as witnesses. Accordingly *John Best*, mentioned in the first count, was called, and the learned Judge told him that, by the law of *England*, no man was bound to state anything which subjected him to a criminal prosecution; and, if he was asked any question with respect to the alleged bribery, he might say whether he would or would not answer it, at his pleasure. The witness, upon being asked whether he knew the defendant, declined answering the question. *The Solicitor General* then produced a pardon of the witness, under

1861.

THE QUEEN
v.
BOYES.

1861.

THE QUEEN
v.
BOYES.

the Great Seal, and handed it to him (a). The learned Judge told the witness that the parchment which was handed to him was a pardon from the Crown for the

(a) The following was the form of pardon in this case:—"Victor by the grace of God, &c. Whereas a certain election was duly had and held, upon the 29th April 1859, at the borough of Beverley, in the county of York, for the electing of a burgess to serve in this present Parliament for the said borough: Now KNOW YE that we, of our special grace, certain knowledge, and mere motion, and for divers good considerations, have pardoned, remitted, and released, and by these presents, for us, our heirs and successors, do pardon, remit, and release A. B. all offences hereafter mentioned, and all and singular indictments, impeachments, informations, informations, suits, plaints, exigents, judgments, attainders, outlawries, executions, corporal imprisonments, pains, penalties, forfeitures, demands, and other punishments whatsoever which he, the said A. B. has incurred or is subject to for or by reason of such offences, or which we now have or can claim, or have had, or which we, our heirs or successors, may hereafter or in any manner have or claim, against the said A. B., for or by reason of or touching such offences, that is to say, for having, either before or during the said election, directly or indirectly, by himself or by any other person on his behalf, received or agreed to receive, or contracted for any money, gift, loan, or valuable consideration, of any place or employment, for himself or for any other person, for voting, agreeing to vote, or for refraining or agreeing to refrain from voting at the said election; and also for having, after the said election, directly or indirectly, by himself or by any other person on his behalf, received or agreed to receive any money or valuable consideration on account of any person having voted or refrained from voting, or having induced any other person to vote or to refrain from voting, at the said election, and all and every other offences and acts of bribery, and all and every bribery and bribes, corrupt practices and corrupt practices, corrupt receivings and payments of money by the said A. B. done or committed, or attempted to be done or committed, at the said election, or whereof the said A. B. was or is guilty in connexion with, touching or relating to the said election, and all and every crime, offence or misdemeanour by the said A. B. done or committed, or attempted to be done or committed, at or before, or during, or after the said election, and in any way connected with, or relating to, or touching the said election; and we do by these presents give and grant unto him, the said A. B., our firm peace thereupon; and, furthermore, we strictly command all and singular judges, justices, and all others whatsoever, that this our present free and gracious pardon shall be construed, expounded, and adjudged in all our Courts and elsewhere by the judges

1861.

 THE QUEEN
 V.
 BOYER.

part he had taken in the transaction, so that he could never be prosecuted for it, and asked him whether that made any difference in his wish to answer the question or not? The witness still declined to answer. The learned Judge expressed great doubt whether he ought to tell the witness that he was bound to answer; and *The Solicitor General* suggested, with respect to this and the other witnesses who should be called, that they should be told that they were bound to answer; and that if there should be a verdict for the Crown, and the defendant should be brought up for judgment, or the defendant should move for a new trial, and the Court of Queen's Bench should be of opinion that the Judge ought not to have required the witnesses to answer, then their answers should not be used against them. He cited *Regina v. Garbett (a)*. The learned Judge, after consulting *Wilde B.*, addressing *The Solicitor General*, said, "If I improperly and illegally compel the witness to answer the question, the defendant is to have the benefit of it; and if the Court shall say that he is relieved from answering because he is liable to some proceeding, you are no longer to press the prosecution; otherwise I shall exclude the evidence." The learned Judge then told the witness that he was bound by law to answer the questions, and therefore he must answer them. Similar pardons were also given to the other witnesses. It appeared from the evidence of the witnesses that on the day of the election they came to the front of

words, clauses, and sentences abovesaid, in the largest and most beneficial sense, for the most full and firm discharge of him the said *A. B.*, according to our true intention expressed in these letters patent, without any ambiguity, question or delay whatsoever" &c.

(a) 2 Car. & K. 474; 1 Den. C. C. 236.

1861.

 THE QUEEN
 v.
 BOYES.

a house which stood between and opened into two parallel streets of the town of *Beverley*, and went in succession into the house, and into a back room, in which the defendant was seated; after an interview with the defendant each of them passed into another room, in which another person was seated, from whom each received the sums mentioned in the several counts of the information; they then passed into the other street, and so to the hustings, and voted. At the close of the case for the prosecution, the counsel for the defendant took several objections; and, among others, that there was no corroborative evidence of the witnesses, who were all accomplices with the defendant, and that the Judge ought to tell the jury that they ought not to convict on the uncorroborated testimony of the accomplices, citing *Regina v. Stubbs* (a). The learned Judge said that he was not prepared to take that course, but that he would reserve leave to the defendant to move for a new trial, on the ground that he was wrong in compelling the witnesses to answer, and on the ground of the absence of corroboration. It was finally agreed that if the Court of Queen's Bench, on a motion for a new trial, should think that there ought to be a new trial on the ground that the witnesses ought not to have been compelled to answer, or that the Judge ought to have directed an acquittal on the ground that there was no confirmatory evidence, then *The Solicitor General* undertook to enter a nolle prosequi. The learned Judge, in summing up, said, "Another question has arisen in this case. There has been a long course of practice, in the administration of the criminal law of this country, that a man cannot be lawfully convicted upon the uncorroborated evidence of an accessory. . . . I think it must

(a) *Dears. C. C.* 555.

be doubtful whether or not the evidence in this case will be found to be of that corroborative character which the law requires ;” but he added that the case was distinguishable from *Regina v. Stubbs* (a), for the witnesses in that case were accessories properly so called, and all concerned in the same offence in which they came to give evidence against the defendant ; whereas in this case, if the jury thought that the witnesses had spoken the truth, all the acts of bribery were separately transacted, and were not one and the same offence. The jury found a verdict of guilty on the third count, and not guilty on the others. In the following *Michaelmas* Term (November 7th, 1860),

1861.

 The QUEEN
 v.
 BOYCE.

Edward James moved for a rule calling upon *The Attorney General* to shew cause why a new trial should not be had, on the grounds, first, that the Judge had improperly compelled the witness to answer, and received in evidence the answers so obtained ; citing *Stark. Ev.* 206, 4th ed., and *Rex v. Reading* (b) : secondly, that there was no evidence in corroboration of the witnesses, and the Judge ought to have cautioned the jury against trusting the evidence of an uncorroborated accomplice.

November 14th. A rule was granted.

This rule was argued at the sittings in banc after *Hilary* Term, 1861, on the 12th and 18th *February* ; before *Wightman, Crompton, Hill* and *Blackburn JJ.*

The Solicitor General, Overend, Monk and *Cleasby* shewed cause. 1. The witness was rightly compelled to answer. By answering he did not become subject

(a) *Dears. C. C.* 555.

(b) 7 *How. St. Tr.* 259. 296.

1861.

The QUEEN
v.
BOYES.

to any criminal proceeding, seeing that the time bringing a *qui tam* action had expired, and he the pardon of the Crown; the effect of which was to make him a new man, and consequently to bar all proceedings by or in the name of the Crown; 2 *Taylor*, § 1312. 3d ed. The author there refers to two old cases, *Rex v. Reading* (a), *Rex v. The Earl of Shaftesbury* (b), which he questions, referring to the note by the reporter in *Roberts v. Allatt* (c). In *Wigr. Discovery*, § 131, the answer of the defendant to a given question was subject him to pains or penalties, the plaintiff is entitled to an answer to such question." In *Regin v. Monro*, tried before *Erle J.*, at the Central Criminal Court in August, 1847, which was an indictment for slaying a duel, Major *Cuddy*, one of the seconds, was called a witness for the Crown, and being desired to state what occurred just before the duel, declined to answer, whereupon which a pardon was produced and given to him; but still objecting, *Erle J.*, said, a pardon takes away the privilege of silence, and therefore he must answer. But where questions tending merely to disgrace the character of a witness are put, he must answer if the questions are relevant to the issue; *Best on Evid.* p. 3d ed.

2. The second branch of the rule also fails. The witness and the defendant are not accomplices; their offenses being quite distinct. Besides this person was not an accomplice in such a sense as to require corroboration. It has been held that persons present at a prize fight, where death ensues, are guilty of manslaughter, but are not accomplices in that sense; *Rex v. Hargrave*. The reason for the rule requiring the confirmation

(a) 7 *How. St. Tr.* 259, 296.(b) 8 *How. St. Tr.* 81.(c) 1 *M. & M.* 193, note (b).(d) 5 *C. & P.* 170.

an accomplice is that the accomplice may be tempted to accuse falsely in order to save himself; *Russ. Cr.* by *Graves*, book 6. ch. 5. sect. 6.; a rule which cannot apply where the alleged accomplice has been pardoned. Whether an individual stands in the position of an accomplice is matter for the discretion of the Judge at the trial. At all events here was corroborative evidence of the accomplice.

1861.

THE QUEEN
V.
BOYES.

Edward James, E. P. Price and T. Jones (Northern Circuit), in support of the rule. 1. The other side assume that a pardon restores the party to the same state as he was in before any offence committed. But the pardoned man may be indicted and put to the inconvenience of pleading his pardon; for unless pleaded it is of no avail; *Com. Dig. Pardon* H. Moreover a pardon may be revoked. Besides, although the Crown may pardon an offence as regards itself, it cannot take away the right of a subject to prosecute for the offence. It is for this reason that the Crown could not pardon in appeals of murder, and the like, for the appeal was the suit of a subject. Supposing, however, that the pardon makes the party a new man so far as prosecution by or in the name of the Crown is concerned, he is still liable to be proceeded against by impeachment, at the suit of the House of Commons, before the House of Lords. When the House of Commons impeached Lord *Danby*, the Crown, pending the impeachment, granted him a pardon; but the Commons denied the right of the Crown to do so (2 *Hallam's Const. Hist.* vol. 2. p. 411. 7th ed.); and afterwards it was enacted by the Act of Settlement, 12 & 13 W. 3. c. 2. s. 3., entitled "An Act for the further limitation of the Crown, and better securing the rights and liberties of the subject," that no pardon of the Crown should be

1861.

The QUEEN
v.
BOYES.

pleadable to an impeachment by the Commons in Parliament; 4 *Blackst. C.* 399. A pardon from the Crown in order to be available in such a case, must be granted after trial of the impeachment, not while the impeachment is pending.

2. As to the point relating to accomplices, the Jury should have advised the jury to acquit unless the accomplice was corroborated; *Regina v. Stubbs (a)*.

WIGHTMAN J. With respect to the questions relating to the accomplice; even supposing that the witness could be considered as an accomplice of the defendant, I think the learned Judge's direction at the trial quite right. The law on this subject is correctly set down in *Regina v. Stubbs (a)*,—it is not a rule of law that an accomplice must be corroborated in order to render a conviction valid; but it is a rule of general and usual practice to advise juries not to convict on the evidence of an accomplice *alone*. The application of this rule, however, is a matter for the discretion of the Judge by whom the case is tried, and here he appears to have drawn the attention of the jury to the point. Moreover, I think there was corroborative evidence here, if corroborative evidence is requisite. It is not necessary that there should be corroborative evidence as to the very facts; it is enough that there be such as shall confirm the witness in the belief that the accomplice is speaking truth.

The point as to the witness being still liable to impeachment by the House of Commons seems to have come on the Crown by surprise, and it raises a serious question. We had therefore better adjourn this case, in order that the matter may be looked into and re-argued,—one counsel to be heard on each side.

(a) *Dears, C. C.* 555.

CROMPTON J. I am of the same opinion. As to the first point, each case must depend on its own particular circumstances, and it is for the Judge at the trial to deal with each; and I should say that here there was corroborative evidence, and that the Judge properly directed the attention of the jury to it. *Regina v. Stubbs* (a) arose on a case reserved by the Judge for the Court of Criminal Appeal, which refused to interfere; but still, if we see that there has been a miscarriage of justice, we may grant a new trial. Then it is said that these witnesses were not accomplices with the defendant; but I think they were to some extent.

1861.
The QUEEN
v.
BOYES.

With respect to the question relative to the effect of the pardon, I think, subject to the objection that has been raised respecting the possibility of impeachment, that the present rule fails. Very few instances of questions as to the effect of pardons are to be found except in the *State Trials*; but the rule appears to be that a pardon removes the privilege of a witness in not answering questions provided they are relevant to the issue. Two cases have been referred to, *Rex v. Reading* (b) and *Rex v. The Earl of Shaftesbury* (c), as authorities to the contrary, but in both the adverse party was attacking the character of the witnesses. That is the distinction between those cases and the present; the witnesses there were justified in refusing to answer what would disgrace them, but witnesses are not justified in refusing to do so where the question is relevant to the issue.

WIGHTMAN J. I forgot that last point, but I quite agree in what my brother Crompton has said.

(a) *Deears. C. C.* 555.

(b) 7 *How. St. Tr.* 259. 296.

(c) 8 *How. St. Tr.* 817.

1861.

The QUEEN
v.
BOYES.

HILL J. I am of the same opinion. In the application of the rule respecting accomplices much depends on the nature of the crime and the extent of the complicity of the witnesses in it. If the crime is a very deep one and the witness so far involved in it as to render him apparently unworthy of credit, he ought to be corroborated. On the other hand, if the offence be a light one as in *Rex v. Hargrave (a)*, which has been referred to where the nature of the offence and extent of complicity would not much shake his credit, it is otherwise. Now here I think there was corroborative evidence of the accomplice, and that the Judge was right in the way in which he called the attention of the jury to

BLACKBURN J. There are cases where the accomplice is completely in the nature of a Queen's evidence; there the Judge is not justified in neglecting to caution the jury so strongly against his evidence, if uncorroborated, as almost to amount to a direction to acquit. But this is not such a case, and I think the Judge at the trial was right in the course he took.

The Court then directed that the remaining points should be argued in the next Term by one counsel on each side. This argument accordingly took place at Easter Term, 1861, on the 25th April; before Cockburn C. J., Crompton, Hill and Blackburn JJ.

Cleasby, for the Crown. The remaining point for discussion in this case is, whether the possibility of the witness, although pardoned by the Crown, be

(a) 5 C. & P. 170.

impeached by the House of Commons for bribery, affords an excuse for his refusing to answer questions tending to shew his guilt of that bribery. This point is quite new, and one on which no authority is to be found, except the case of *Regina v. Monro*, referred to on the last argument. [Cockburn C. J. That was a case of felony, not misdemeanor.] The law is laid down in 2 *Tayl. Ev.* § 1308. 3d ed., that a witness is not compellable to answer questions the answers to which would have a *tendency* to expose him to a criminal charge; and in § 1312. it is stated that if the offence has been pardoned, the witness will be bound to answer. These passages, however, do not refer to the case of impeachment, which was not present to the author's mind. [Blackburn J. *Taylor* refers to an *American* case, *The People v. Mather* (a), where *Marcy* J. delivered the judgment of the Court, and, after a learned and elaborate argument, decided that the witness there was not obliged to answer. His conclusion is, p. 257, "I think the Judge could not safely say that the privilege was claimed by the witness in this case as a mere subterfuge to suppress the truth, and thereby aid the escape of the guilty." That is the reason of the decision, and it is a very sensible rule to go by.]

The possibility of impeachment by the House of Commons is so remote that the Judge at the trial ought not to take it into consideration, and great difficulties would arise in the administration of justice from his doing so. An impeachment by the House of Commons is only resorted to for great and enormous offences, with which the ordinary tribunals are unable to deal; *Com. Dig., Parliament*, L. 28—40; 4 *Bl. Com.* 259; 2 *Inst.* 50.

(a) 4 *Wend.* 223.

1861.
The QUEEN
v.
BOYER.

1861.

The QUEEN
v.
BOYES.

Thus one of the articles of impeachment against the Earl of *Strafford* was endeavouring to stir up enmity and hostility between His Majesty's subjects of *England* and those of *Scotland* (a); and one of those against *Warren Hastings* was that he had, contrary to justice and honour, abandoned a certain party. [*Crompton J.* Are you not confounding an impeachment with a bill of attainder? The House of Commons were unable to impeach Sir *John Fenwick* of high treason because there was only one witness against him, the other having been spirited away; but they and the Lords passed a bill of attainder to cut off his head on the evidence of one (b).] There may be some difference between impeachment and bill of attainder. [*Cockburn C. J.* Suppose the House of Commons found that in some particular place there was such an incurable tendency to bribery that no hope of a conviction before an ordinary Court of justice could be had, however plain the proof, and therefore thought the better course would be to impeach the parties before a tribunal where justice would be certain. *Crompton J.* If that would be unconstitutional, it was worse to impeach a clergyman for preaching a high church sermon (c).] In any event the Judge is bound to consider whether the party is liable to be impeached in the ordinary course of things, not in extraordinary circumstances. If, indeed, the House of Commons had passed a resolution declaring the witness, and the acting with him, guilty of bribery, and that they ought to be impeached; then he might be said to be in some danger. But, so far is that from being the case he

(a) 3 *How. St. Tr.* 1382. 1386.

(b) See his case, 13 *How. St. Tr.* 538.

(c) See *Dr. Sacheverell's Case*, 15 *How. St. Tr.* 1.

that the House, instead of proceeding by impeachment, expressly directed this prosecution according to the ordinary law of the land. [Crompton J. There is always the remote possibility that there may be some informality in the pardon. Is a witness justified in refusing to answer on that account?] There in reality there is no pardon.

As to the argument founded on the Act of Settlement, 12 & 13 W. 3. c. 2. s. 3.; that statute does not render a pardon inoperative in the case of impeachment, but simply prevents its being *pleaded*, so as to suppress public inquiry into the case. In *Vin. Abr., Prerogative* (T.2.), pl. 33., it is laid down that the King cannot be divested of any of his prerogatives by general words in an Act of Parliament, but that there must be plain and express words for that purpose.

Edward James, *contra*. With respect to the last part of the argument of the Crown, the Act of Settlement introduced no new law, but was declaratory of the old. So far back as the time of *Ed. 3*, the prerogative of pardon in the Crown lay under limitation; *Com. Dig., Pardon* (B.) [Cockburn C. J. The majority of the Court are of opinion that the effect of the provision in the Act of Settlement which has been referred to is to render a pardon wholly inoperative to prevent impeachment by the House of Commons, and thereby getting rid of the judgment of the House of Lords; for that purpose a *subsequent* pardon must be granted by the Crown. My brother *Blackburn* does not come to the same conclusion; but he agrees with us that that question need not be considered now, for it is a matter of some doubt and difficulty, and we think that a man ought not to be put in peril by being com-

1861.

THE QUEEN
V.
BOYES.

1861.
The QUEEN
v.
BOYES.

a pardon under the Great Seal to the witness, who accepted it. The witness however still objecting to give evidence, and the learned Judge who presided at the trial entertaining doubts as to whether the witness could be properly compelled to answer notwithstanding the pardon, an arrangement was come to between the counsel on both sides, with the sanction of the Judge, that the witness should be directed to answer, but that the opinion of this Court should be taken as to whether the privilege of the witness remained notwithstanding the pardon; the counsel for the Crown undertaking, in the event of this Court holding the affirmative, to enter a nolle prosequi if the defendant should be convicted.

We think it necessary to protest against a repetition on any future occasion of a proceeding which we believe to be wholly unprecedented, it appearing to us inconvenient and unbecoming that this Court should be called upon to pronounce a judgment which it is without authority to enforce. It is perhaps to be regretted that a rule nisi should under such circumstances have been granted. Probably, had the rule nisi for a new trial been moved for on this ground alone, we should have refused the rule, but, the rule having been moved for on other grounds as well as on this, it was perhaps somewhat improvidently allowed on this ground also. Now however, the matter having been discussed on a rule granted by us, we think it best to pronounce our opinion on the point submitted to us; but we are anxious to protect ourselves against the present proceeding being drawn into precedent, or adopted on any future occasion.

Upon the first argument, we held that the pardon took away the privilege of the witness, so far as regarded any

risk of prosecution at the suit of the Crown, but it was objected that a pardon was no protection against an impeachment by the Commons in Parliament, and on this point the case was argued before us in the last Term.

1861.

The QUEEN
v.
BOYES.

The question on which our opinion is now required is whether the enactment of the 3d section of the Act of Settlement, 12 & 13 W. 3. c. 2., that "no pardon under the Great Seal of *England* be pleadable to an impeachment by the Commons in Parliament," is a sufficient reason for holding that the privilege of the witness still existed in this case, on the ground that the witness, though protected by the pardon against every other form of prosecution, might possibly be subject to parliamentary impeachment. In support of this proposition it was urged, on behalf of the defendant, that bribery at the election of members to serve in Parliament being a matter in which the House of Commons would be likely to take a peculiar interest as immediately affecting its own privileges, it was not impossible that, if other remedies proved ineffectual, proceedings by impeachment might be resorted to. It was also contended that a bare possibility of legal peril was sufficient to entitle a witness to protection: nay, further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law: and that the statement of his belief to that effect, if not manifestly made *malâ fide*, should be received as conclusive.

With the latter of these propositions we are altogether unable to concur. Upon a review of the authorities, we are clearly of opinion that the view of the law propounded by Lord *Wensleydale*, in *Osborn v. The London Dock Company* (a), and acted upon by V. C. *Stuart*, in *Sidebottom v. Adkins* (b), is the correct one; and that, to en-

(a) 10 *Exch.* 698. 701.(b) 3 *Jur. N. S.* 631.

1861.

The QUEEN
v.
BOYES.

title a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We indeed quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question : there being no doubt, as observed by Alderson B., in *Osborn v. The London Dock Company* (a), that a question which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. Subject to this reservation, a Judge is in our opinion, bound to insist on a witness answering unless he is satisfied that the answer will tend to place the witness in peril.

Further than this, we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding inter alios, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it

(a) 10 *Exch.* 698. 701.

were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice.

Now, in the present case, no one seriously supposes that the witness runs the slightest risk of an impeachment by the House of Commons. No instance of such a proceeding in the unhappily too numerous cases of bribery which have engaged the attention of the House of Commons has ever occurred, or, so far as we are aware, has ever been thought of. To suppose that such a proceeding would be applied to the case of this witness would be simply ridiculous; more especially as the proceeding by information was undertaken by *The Attorney General* by the direction of the House itself, and it would therefore be contrary to all justice to treat the pardon provided, in the interest of the prosecution, to ensure the evidence of the witness as a nullity, and to subject him to a proceeding by impeachment.

It appears to us, therefore, that the witness in this case was not, in a rational point of view, in any the slightest real danger from the evidence he was called upon to give when protected by the pardon from all ordinary legal proceedings; and that it was therefore the duty of the presiding Judge to compel him to answer.

It follows that, in our opinion, the law officers of the Crown are not bound to enter a nolle prosequi in favour of the defendant.

Rule discharged-accordingly.

1861.

The QUEEN
V.
BOYER.

1861.

Tuesday,
May 28th.

BELLINGHAM and another against CLARK.

*Misjoinder of
plaintiffs.
Common Law
Procedure Act,
1860 (23 & 24
Vict. c. 126.),
s. 19.*

A declaration alleged that *A.*, administrator of *B.* and *C.*, sued *D.* for money payable by him to *A.* as administrator, and *C.*; for money paid by *C.* and *B.* in his lifetime &c.; and for money paid by *A.*, administrator &c., and *C.*; and for money lent by *C.* and *B.* in his lifetime; and for money lent by *A.*, administrator &c., and *C.*; and on accounts stated between the defendant and *A.*, administrator &c., and *C.* To this declaration the defendant demurred. Held,

1. That the declaration was bad for misjoinder,
2. That the defect was not cured by The Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126.), s. 19.

THE declaration alleged that *Francis Field Bellingham*, administrator of the goods, chattels and credits of *Thomas Bellingham*, deceased, who died intestate, &c., and *William Williams*, sued *Henry Clark* for money payable by the defendant to the said *Francis Field Bellingham*, administrator as aforesaid, and the said *William Williams*; for money paid by the said *William Williams* and the said *Thomas Bellingham* in his lifetime for the defendant at his request; and for money paid by the said *Francis Field Bellingham*, administrator as aforesaid, and the said *William Williams* for the defendant at his request; and for money lent by the said *William Williams* and the said *Thomas Bellingham* in his lifetime to the defendant, and for money lent by the said *Francis Field Bellingham*, administrator as aforesaid, and the said *William Williams* to the defendant; and for money found to be due from the defendant to the said *Francis Field Bellingham*, administrator as aforesaid, and the said *William Williams* upon accounts stated between the defendant and the said *Francis Field Bellingham*, as administrator as aforesaid, and the said *William Williams*: and the said *Francis Field*

Bellingham, administrator as aforesaid, and the said *William Williams*, claimed 200*l*.

1861.

BELLINGHAMv.
CLARK.

The defendant demurred, alleging for grounds that there could be no such causes as those stated in the declaration in which the administrator of a deceased can sue jointly with another suing in his own right on contracts. As to the counts on contracts supposed to have been made by the defendant with the intestate and *Williams*, the administrator had no legal interest, as the legal interest and right to sue would survive to *Williams*. As to the counts on causes of action supposed to have accrued to the administrator and *Williams*, the administrator either was not entitled at all if they arose out of contracts made with the deceased, or not entitled as administrator if they arose out of contracts made with him and *Williams*. There was also a misjoinder of causes of action, part of the money sought to be recovered being assets of the deceased and part not such assets of the deceased; and part could only be due to *Williams* alone, and part might be due to both plaintiffs.

Joinder in demurrer.

Wathin Williams, in support of the declaration.—Previous to The Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126.), sect. 19, this declaration would have been bad for misjoinder; but that section removes the difficulty. It enacts "The joinder of too many plaintiffs shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist; and judgment may be given in favour of the plaintiffs by whom the action is brought, or of one or more of them, or, in case of any question of misjoinder being

1861.
 BELLINGHAM
 v.
 CLARK.

raised, then in favour of such one or more of them as shall be adjudged by the Court to be entitled to recover : provided always, that the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person or persons in whose favour judgment is not given, unless otherwise ordered by the Court or a Judge." That applies here, for the plaintiffs, not knowing which of them is entitled to sue, have declared in the names of both. [*Crompton J.* The meaning of the statute is that you may join in your declaration all the persons whom you suppose entitled to sue on a contract ; but it does not authorize you to make several persons declare on a contract the right to sue on which has come to one of them by survivorship. The section in question relates to what takes place at a trial, not to the case of a demurrer.] If that be so, the defendant ought not to have demurred to the declaration, but reserved his objection for the trial.

No counsel appeared on the part of the defendant.

COCKBURN C. J. The statute meant to cure this evil : you put into a declaration as plaintiffs several persons, believing them to have a joint cause of action that turns out to be a mistake, for it is found that some of them are not entitled to recover. Before the statute you would have lost ; but sect. 19 of the statute says that the names of those persons may be struck out. That enactment, however, does not apply when you bring an action, not believing that all the plaintiffs have a joint right of action, and it appears on the face of the proceedings that the action ought to have been brought by some of them only. Two plaintiffs cannot

bring an action, saying, one or other of us is entitled to recover. You must amend.

1861.

BELLINGHAMv.
CLARK.

WIGHTMAN J. Here these persons cannot be joined as plaintiffs. The statute meant to apply where all could be joined.

CROMPTON J. In other words, you here-state an impossible cause of action. You do not shew any consideration to these two persons for the contract on which you have declared.

BLACKBURN J. concurred.

Watkin Williams. If the Court compels us to amend, it will do so by allowing us to strike out the name of one of the plaintiffs.

CROMPTON J. This declaration was drawn perversely, with the intent to make a bad use of the statute. You must amend on the usual terms. These experiments ought not to be encouraged.

Judgment for the defendant, unless
the plaintiffs amend on the usual
terms within ten days.

1861.

PATERSON *against* HARRIS.

Wednesday,
May 29th.

Marine insurance.
Perils of the seas.
Chemical action of the sea.
Atlantic telegraph.
Damages.
3l. per cent. clause in common memorandum.

1. A person possessed of a share in *The Atlantic Telegraph Company*, established for the purpose of laying down a submarine electric cable between the United Kingdom and America, insured the same by a policy in the ordinary form of a policy of marine insurance. The insurance was expressed to be "at and from the United Kingdom, say from *London*, and wheresoever the risk may commence, to the *Atlantic Ocean*, and at and thence, by or in one or more ship or ships, or steamer or steamers, to the place or places of destination, both in the United Kingdom ^{and} _{or} the Continent, island or peninsula of *America*, ^{and} _{or} the *British* or other possessions of *America*, including and containing all and every accident, danger and risk that may be incurred at sea or on land in all or any boats, ships, and craft whatsoever and wheresoever, until the final, complete and successful laying down of the *Atlantic Telegraph Cable* from shore to shore." The usual blank for the name of the ship was filled up thus: "any ship or ships, or steamer or steamers, or craft as above;" and in the valuation clause the subject of insurance was to be taken as "on one 1000*l.* share in *The Atlantic Telegraph Company*, said share valued at 1100*l.* In case of loss the part saved to be sold or appraised for the benefit of the underwriters." The insurance contained the common memorandum, with the addition of a special agreement, in a memorandum annexed to the policy, that the insurance should "cover and include the successful working of the cable when laid down." An electric cable extending from the *Irish* to the *North American* coast was finally laid down after a previous abortive attempt, during which a portion of it was lost by perils of the seas; and on the second attempt, during which some more cable was lost, a quantity of superfluous cable was taken out to meet contingencies. It was, however, found impossible to maintain electrical communication sufficient for telegraphic purposes, and the telegraph was abandoned. The cause of the failure was the imperfect insulation of the copper wire along which the electric fluid passed, arising from defect in the outer covering by which it was protected from external contact; which defect was occasioned by accident prior to the shipment of the cable and the commencement of the risk, aggravated by the action of the sea, and arose from the *chemical* action of the sea water on the interior of the cable, and not from any mischief done by the *mechanical* action of the sea: held, that this was not an injury caused by "perils of the seas."

2. In an action on the policy with respect to the portion of the cable lost by perils of the seas: held, that the plaintiff was entitled to recover as for a partial loss.

3. In the same case: held also that the warranty against partial average was applicable, and consequently that the plaintiff could not recover unless a loss of 3*l.* per cent. had been sustained.

4. Held also, in the same case, that in assessing the damages the value of the whole cable that ever was exposed to peril, including the portion lost, must be ascertained according to its cost, when shipped free on board; and that the proportion between that value and the loss actually incurred by the perils insured against would give the per centage payable by each underwriter on his subscription.

5. Held also that, in applying the above principle, that portion of the

cable which was lost in the first attempt to lay down the cable, and which it became necessary to replace by new cable, should be estimated at the cost of the substituted cable; but that as regarded that portion of the lost cable which was taken out as superfluous cable, by way of a provision against accident, it might be reasonable to consider how far such cable, if not lost, would have been depreciated in marketable value by having been coiled in the hold of a vessel or by other circumstances.

1861.

PATERSON
v.
HARRIS.

THE first count of the declaration alleged that the plaintiff was possessed of a share in *The Atlantic Telegraph Company*, a Company established for the purpose of laying down a submarine electric cable between the United Kingdom and *America*, the said share being of great value, to wit of 1100*l.*, and thereupon the plaintiff, on the 1st *July*, 1857, caused to be made a certain policy of insurance in the words and figures following (that is to say). "In the name of God, Amen. *Walter Paterson*, Esq., as well in his own name as for and in the name and names of all and every other person or persons, to whom the same doth, may, or shall appertain, in part or in all, doth make assurance, and cause himself and them, and every of them to be insured, lost or not lost, at and from the United Kingdom, say from *London* and wheresoever the risk may commence, to the *Atlantic Ocean*, and at and thence by or in one or more ship or ships, or steamer or steamers, to the place or places of destination, both in the United Kingdom ^{and}_{or} the continent, island or peninsula of *America* ^{and}_{or} the British or other possessions of *America*, including and containing all and every accident, danger, and risk that may be incurred at sea or on land in all or any boats, ships, and craft whatsoever and wheresoever, until the final complete and successful laying down of the *Atlantic Telegraph Cable* from shore to shore, upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, ordnance, munition,

TRINITY TERM.

1887.
2. 1888.
HARRIS.

artillery, boat, and other furniture off and in the good
ship or vessel called the (a) any ship or ships
or steamer or steamers, or craft as above, whereof

is master under God for this present voyage,
or whosoever else shall go for master in the said ship,
or by whatsoever other name or names the same ship or
master thereof is or shall be named or called, beginning
the adventure upon the said goods and merchandizes,
from the loading thereof aboard the ship as above, upon
the same ship, &c., and so shall continue and endure
during her abode there upon the said ship, &c., and
further until the said ship, with all her ordinance, tackle,
apparel, &c., and goods and merchandizes whatsoever
shall be arrived at as above upon the said ship, &c., until
she hath moored at anchor twenty-four hours in good
safety, and upon the goods and merchandizes until the
same be there discharged and safely landed. And it
shall be lawful for the ship, &c. in this voyage to pro-
ceed and sail to, and touch and stay at, any ports or
places whatsoever and for all purposes, without prejudice
to this insurance. The said ship, &c., goods and merchan-
dizes, &c., for so much as concerns the assured, by agree-
ment between the assured and assurers in this policy are
and shall be valued at on one 1000*l* share in *The Atlantic
Telegraph Company*. Said share valued at 1100*l*. In
case of loss, the part saved to be sold or appraised for
the benefit of the underwriters. Touching the adven-
tures and perils which we the assurers are contented to
bear, and do take upon us in this voyage, they are of
the seas, men of war, fire, enemies, pirates, rovers,
thieves, jettisons, letters of mart and countermart,

(a) The usual blank for the name of the ship was filled up "any ship
or ships, or steamer or steamers, or craft as above."

1861.

 PATERSON
 v.
 HARRIS.

surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes and people, of what nation, condition or quality soever, barratry of the master and mariners, and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandizes, and ship, &c., or any part thereof. And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour and travel for, in and about the defence, safeguard, and recovery of the said goods and merchandizes, and ship, &c., or any part thereof, without prejudice to this assurance, to the charges whereof we the assurers will contribute each one according to the rate and quantity of his sum herein assured. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in *Lombard Street* or in *The Royal Exchange* or elsewhere in *London*. And so we the assurers are contented, and do hereby promise and bind ourselves each one for his own part, our heirs, executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of thirty-five guineas per cent. In witness whereof we the assurers have subscribed our names and sums assured in *London*, 1st July, 1857.

N. B. Corn, fish, salt, fruit, flour, and seed are warranted free from average unless general or the ship be stranded. Sugar, tobacco, hemp, flax, hides and skins are warranted free from average under 5% per cent., and all other goods, also the ship and freight, are war-

1861.

 PATERSON
 v.
 HARRIS.

ranted free from average under 3*l.* per cent., unless general or the ship be stranded. [Here followed the names of the insurers subscribing for the several sums amounting in the whole to 1100*l.*, among which appeared that of the defendant thus, *Frederick W. Harris*, for 150*l.*, 1st *July*, 1857.] And the plaintiff says that the said *Walter Paterson*, in the said policy mentioned, is the plaintiff, and the said *Frederick William Harris*, therein also mentioned, is the defendant, of all which premises the defendant afterwards had notice; and thereupon afterwards, on the day and year last aforesaid, in consideration that the plaintiff, at the defendant's request, had then paid to the defendant a certain sum, to wit 55*l.* 2*s.* 6*d.*, as a premium for the insurance of 150*l.* of and upon the said premises in the said policy mentioned, and had then promised defendant to perform the said policy on his part, the defendant then promised the plaintiff that he would become and be an insurer to the plaintiff of the sum of 150*l.* upon the said premises, and would perform all things in the said policy on his part; and the defendant then became and was such insurer to the plaintiff accordingly, and duly subscribed the said policy. And the plaintiff says that at the time of the making of the said policy and promise of the defendant, and from thence continually until and at the time of the loss hereinafter mentioned, he was interested in the said premises so insured by the said policy as aforesaid to the full value of all the monies by him ever insured thereon. And the plaintiff says that, after the making of the said policy and promise of the defendant, the said Company commenced laying down the said cab

from the United Kingdom to *America*, as in the said policy mentioned, and that afterwards, and before the final, complete or successful laying down of the same, the said cable was, by the perils of the seas, totally lost, and never was finally, completely or successfully laid down. And the said share then and thereby, after the making of the said policy and promise of the defendant, and during the continuance, and before the determination of the risk in the said policy mentioned, by certain perils therein and thereby insured against, to wit by perils of the sea, became and was wholly lost, and of no value to the plaintiff; of all which the defendant had notice. Averment of performance by the plaintiff &c.: and statement of breach that the defendant refused to pay the amount so insured by him to the plaintiff, or any part thereof, though requested so to do.

The second count alleged that the plaintiff was possessed of a share in *The Atlantic Telegraph Company*, a Company established for the purpose of laying down a submarine electric cable between the United Kingdom and *America*, the said share being of a great value, to wit of 1100*l*. And thereupon the plaintiff, on the 1st of *July* 1857, caused to be made a certain policy of insurance in the words and figures in the first count set forth. And the plaintiff says that the said *Walter Paterson*, in the said policy mentioned, is the plaintiff; and the said *Frederick William Harris*, therein also mentioned, is the defendant. And the plaintiff says that, by a certain memorandum to the said policy annexed and forming part thereof, it is declared as follows: "It is understood and agreed that this insurance shall cover and include the successful working of the cable when laid down. *London*, 1st *July*, 1857." Of

1861.

 PATERSON
 V.
 HARRIS.

1861.

PATERSON

v.

HARRIS.

all which premises the defendant afterwards had notice, and thereupon afterwards, on the day and year last aforesaid, in consideration that the plaintiff, at the defendant's request, had then paid to defendant a certain sum, to wit 55*l.* 2*s.* 6*d.*, as a premium for the insurance of 150*l.*, of and upon the said premises in the said policy and memorandum mentioned, and had then promised defendant to perform the said policy and memorandum on his part, the defendant then promised the plaintiff that he would become and be an insurer to the plaintiff of the sum of 150*l.* upon the said premises and would perform all things in the said policy and memorandum on his part; and the defendant then became and was such insurer to the plaintiff accordingly, and duly subscribed the said policy and memorandum. And the plaintiff says that, at the time of the making of the said policy and memorandum and promise of the defendant, and from thence continually until and at the time of the loss hereinafter mentioned, he was interested in the said premises so insured by the said policy and memorandum as aforesaid to the full value of all the monies by him ever insured thereon. And the plaintiff says that, after the making of the said policy and memorandum and promise of the defendant, the said Company commenced laying down the said cable from the United Kingdom to *America*, as in the said policy mentioned, and that afterwards, and before the complete and successful laying down and working of the same, the said cable was, by the perils of the seas, totally lost, and never was completely and successfully laid down and worked. And the said share then and thereby after the making of the said policy and memorandum and promise of the defendant, and during the continuance and before

the termination of the risk in the said policy and memorandum mentioned, by certain perils therein and thereby insured against, to wit by perils of the seas, became and was wholly lost, and of no value to the plaintiff; of all which the defendant had notice. Averment of performance by the plaintiff, &c.: and statement of breach that the defendant refused to pay the amount so insured by him to the plaintiff, or any part thereof, though requested so to do.

There was also the common count for money had and received.

Pleas. 1. That the defendant did not promise or become an insurer as alleged.

2. To the 1st count. That the subject matter of the said insurance was not, nor was any part thereof, during the continuance of the risk covered by the said policy, lost by the perils insured against, or any of them.

3. To the 2d count. That the subject matter of the said insurance was not nor was any part thereof, during the continuance of the risk covered by the said policy and memorandum, lost by the perils insured against, or any of them.

4. To the whole declaration. Payment before action brought.

5. To the common count. Never indebted.

Issue on all the pleas.

On the trial, before *Cockburn* C. J., at the Sittings in *London* after *Trinity* Term in 1860, it appeared from the evidence adduced by the plaintiff that the plaintiff was the owner of a share in *The Atlantic Telegraph Company*; and that the defendant, who is a member of *Lloyds*, underwrote the policy set out in the 1st count, with the memorandum set out in the second count attached to it. The attempt to lay the cable was commenced—the cable

1861.

PATERSON
V.
HARRIS.

1861.

PATERSON

v.

HARRIS.

being on board two ships, the *British* ship of the line *Agamemnon*, and the *United States* frigate *Niagara*—in the latter end of *July*, 1857; but a breakage occurred, and a considerable length of cable was lost. The attempt was then put off till *June*, 1858. In the meantime a fresh length of cable was made to supply the loss, and altogether 900 miles more of cable were shipped than were actually wanted, in order to meet contingencies. On the second expedition, after a further length of cable had been lost, the cable was laid from the *Irish* coast to *Newfoundland*, on the coast of *North America*. After the laying was completed, electric communication was carried on for some little time between the two countries but ultimately it was found impossible to keep up the communication between the termini, in consequence of the imperfect insulation of the copper wire along which the electric fluid passed; arising from some defect, in one or more places, in the outer covering by which it was protected from external contact. The cause of the failure was owing to the *chemical* action of the sea water on the interior of the cable, to which, by the defect of the outer covering at the time the cable was immersed in the water, it was enabled to penetrate—and not to any mischief done by the *mechanical* action of the sea. It was admitted that 373 miles of cable had been lost by perils insured against. No evidence was adduced by the defendant. The Lord Chief Justice left certain questions to the jury, which, with their answers, were as follows:—

“Was the cable ever finally, completely, and successfully laid down, so as to be capable of being successfully worked?—Yes, completely laid; but not so as to be capable of successful continuous working.

"As to the cause of its failure, was the cable when laid down defective?—Yea.

1861.

PATERSON
V.
HARRIS.

"If so, was the defect one in the original construction, or did it arise from accidental causes?—From accidental causes.

"If the latter, did the accident arise before the commencement of the voyage, or during its continuance?—Previous to shipment.

"Or did it arise, after the cable was laid down, from the cable scraping on rocks, or other similar cause?—No.

"If the defective working of the cable is attributable to defect existing at the time of laying it down, is it to be attributed to such defect alone, or to such defect aggravated by the action of the sea?—Aggravated by the action of the sea."

The Lord Chief Justice thereupon directed a verdict for the plaintiff, leave being reserved to move to enter the verdict for the defendant; or to reduce the verdict to the amount of depreciation consequent upon the loss of 373 miles of cable; and, if the verdict should stand for the plaintiff in whole or in part, the Court to decide on what principle the damages should be assessed.

It was agreed between the parties that, if the plaintiff should be held entitled to a verdict in respect of partial loss, the damages should be assessed out of Court by an arbitrator chosen by the parties.

Bovill, in *Michaelmas* Term, 1860, obtained a rule accordingly, or for a new trial: which was argued in *Easter* Term, 1861, on the 29th *April* and the 2d *May*; before *Cockburn* C. J., *Crompton*, *Hill* and *Blackburn* JJ.

Phipson and *W. Murray* shewed cause.—This was a loss by "perils of the seas." [*Blackburn* J. In

1861.

PATERSON
v.
HARRIS.

2 *Arnould Ins.*, 781-2 (2d ed.), it is said: "Where the leak arises from the unseaworthy state of the ship when she sailed, and is only a consequence of that ordinary amount of straining to which she would unavoidably be exposed in the general and average course of the voyage insured, the underwriter is not liable." The same author, p. 817, defines loss by perils of the seas as including "all kinds of marine casualties, such as shipwreck, foundering, stranding, &c. ; and every species of damage done to the ship or goods at sea by the violent and immediate action of the winds and waves, as distinct from that included in the ordinary wear and tear of the voyage, or directly referable to the acts and negligence of the assured as its proximate and sole conducive cause." * * * "Foundering at sea," he adds, "when proximately caused by the fury of storms and tempests, is an obvious case of loss by the perils of the seas." In *Perfitt v. Thompson (a)*, which was an action on a policy in which it was declared that the ship should be deemed seaworthy, *Pollock C. B.* says, p. 395: "It appears to me, that, if the vessel had foundered in a perfectly calm sea, from a leak occasioned by rottenness, on the day after the policy was effected, the underwriters would have been liable." Where a ship is lost in consequence of being run down by another, without fault on either side, it is a loss by perils of the seas; *Buller v. Fisher (b)* and the same holds where the loss was occasioned by the grossest negligence on the part of the ship by which the other was run down; *Smith v. Scott (c)*. [*Blackburn J.* Suppose, what is every day's occurrence, a ship goes to sea with her sheathing in a proper state, and is

(a) 13 *M. & W.* 392.(b) 3 *Esp.* 67.(c) 4 *Taunt.* 126.

is corroded by the chemical action of the water, would the underwriter be held responsible? If not, what is the difference between that case and this, where the sea corrodes the copper wire within the casing?] That case is distinguishable. This is a novel manufacture, on which the operation of sea water is unknown. Suppose a diver, who goes down with a cap on his head, insures himself against perils of the seas, and the sea percolates through the cap by degrees, would not the underwriter be liable? [*Cockburn* C. J. There the insurance would be on the thing which was described in the policy as the means of protection from the sea.]

2. As to the amount of the verdict. The subject-matter of the policy is the plaintiff's share in *The Atlantic Telegraph Company*, not in the cable; and the insurance was on the plaintiff's share in the Company until the successful working of the cable should be established. The plaintiff is, consequently, entitled to recover the amount of the depreciation which his share in the Company has undergone in consequence of the failure in working the cable. The policy is a very novel one. It is an ordinary ship policy, adapted to a subject-matter to which its terms are not strictly applicable; and a liberal construction must therefore be given to it in order to carry out the intention of the parties. Here is no warranty of seaworthiness; and, although the peril by which the injury was caused might not be a peril of the seas in the case of a ship, it must be taken to have been a peril contemplated by the parties insuring such a subject-matter as this. [*Blackburn* J. Has the point ever been started that what is a peril of the seas within a policy on one subject matter, may not be a peril of the seas within a policy on another subject

1861.

PATERSON
v
HARRIS.

1861.

PATERSON

v.

HARRIS.

matter?]

No decided case on the point has been found. [*Blackburn J.* In 1 *Phil. Ins.* 617. (3rd ed.)] is said (sect. 1086): "The underwriter is not liable for the consequences of the perils assumed, except when they operate in an extraordinary degree; and he is liable only for loss and damage of an extraordinary kind. And sect. 1087: "Though the operation of a peril insured against is extraordinary, if its consequences are not so, it is not a loss within the policy." * *

"But what is to be considered ordinary, and what extraordinary, in the degree and effects of the perils, is a question for the jury of much difficulty, and one that cannot be more definitely stated."]

Lush, Bovill and Honyman, in support of the rule.—1. On the main question, the finding of the jury shews that the failure of the adventure was not caused by perils of the sea but by the natural, ordinary action of the sea on the cargo in the injured state in which it was when immersed. The language of *Pollock C. B.* in *Parfitt v. Thompson* (a) is only a dictum, which was not adopted by the rest of the Court, and is overruled by *Fawcus v. Sarsfield* (b). In that case a vessel was sent to sea in a state not fit for her voyage,¹ and did not encounter any more severe weather than is usual and ordinary on such a voyage, or than a ship reasonably fit for it could have encountered without injury. Having been compelled to return into port for repairs owing to the defective state of the vessel in which she sailed, it was held that the shipowner could not, though the defects were not known to him, and though he had acted without fraud, and though there was no warranty of seaworthiness, recover the expences of those repairs.

(a) 13 M. & W. 392, 395.

(b) 6 E. & B. 192.

against the insurer. In *Magnus v. Buttemer* (a), also where a ship took the ground in the falling of the tide, and received damage, in a harbour, in which she was properly placed for the purpose of unloading, this was held not a stranding within the terms of an ordinary policy.

1861.

 PATERSON
v.
HARRIS.

2. As to the claim in respect of the partial loss, namely of the 373 miles of cable.—This kind of undertaking does not include the case of partial loss. It is true this is not a policy warranting the cable, but a policy insuring a share in the Company. The meaning of that, however, is that the underwriter insures that the whole enterprise shall not be unsuccessful by reason of perils of the seas—mischief from which can only be caused by the sea acting on the cable. This is confirmed by the provision in the policy that “in case of loss the part saved” is to be “sold or appraised for the benefit of the underwriters.” After the loss of the 373 miles of cable, more than sufficient was left to complete the successful working of the telegraph. A mast of a ship insured for a voyage might be lost or injured so as to be worthless when the ship arrived at her port of destination; this would not be a partial loss for which the owner could recover. Suppose a man insured a share in *The Crystal Palace Company*, a damage happening to the building by wind, &c., might not affect his share in proportion to the extent of the damage done to the building, and might not affect its value at all if the undertaking were successful. [*Blackburn J.* The general principle governing these cases is that of “indemnity.” The underwriter undertakes, as far as money will go, to put the assured in the same situation

(a) 11 C. B. 876.

1861.

PATERSON

v.

HARRIS.

as if the loss had not happened. His Lordship referred to *Livie v. Janson*, 12 *East*, 648.] In *Stewart v. Steele* (a) a ship sustained damage by a collision. Her wales were injured, and she was found to leak so much that she was compelled to return. She underwent repair—was recoppered—and again set sail, but was again compelled to return, and put into dock, and her wales removed, when she was found so defective as to render it inexpedient to repair her: held that the plaintiff was not entitled to recover against the underwriter what would have been necessary to replace the wales, as that expence had not actually been incurred. In *M'Swiny v. The Royal Exchange Assurance* (b), the plaintiff had contracted to buy of D. 6000 bags of rice coming from M. before the end of May, and had also contracted with W. to sell them at an advanced price; and it was held by this Court and the Exchequer Chamber that his expected profit was an insurable interest. Also, after a portion of the rice had been shipped at M., the rest being there ready for shipment, the vessel was blown out to sea by a gale of wind, and the shipped portion spoiled: the rest was not put on board, and the voyage was not performed in time for completion of the contract. On this it was held by the Exchequer Chamber that the defendants were liable only for the quantity put on board; and that, if the policy ever did apply to the rice which was on shore, but not shipped, the defendant was not liable for a loss by perils of the seas which did not *directly* affect him.

3. But suppose the defendant is liable, then the insurance being on the cable, is an insurance on goods; and the common memorandum clause prevents the plaintiff from recovering unless he shews a loss ex-

(a) 5 *Scott. N. R.* 927.(b) 14 *Q. B.* 634. *S. C. in Exch. Ch.* 696.

ceeding 3½ per cent. on the total value of the share. That is not shewn here; for it comes to the question what would be the market price of the 373 miles of cable which were lost. They probably would have sold for next to nothing, for they would be of no use except as specimens.

1861.

PATERSON
v.
HARRIS.

Cur. adv. vult.

The judgment of the Court was now delivered by

COCKBURN C. J. This was an action on a policy of insurance of a novel and somewhat remarkable character; being a policy on the plaintiff's share in a Company called *The Atlantic Telegraph Company*, formed for the purpose of laying down an electric cable between this country and *America*, in order to maintain telegraphic communication between the continents of *Europe* and *North America*. The policy was in the ordinary form of marine insurance, with the addition of a special agreement contained in a memorandum annexed to the policy that the insurance should "cover and include the successful working of the cable when laid down." The purpose and effect of the policy was plainly to protect the insured against the loss of, or injury to, the cable (on the successful laying down of which the interest of the Company and its shareholders depended) from sea risk during the time it was being carried out or being laid down between the opposite shores. It appears to have been taken for granted that, the cable once safely laid down, its successful working would follow as a necessary consequence. Such however, unhappily, did not prove to be the case. Although an electric cable, extending from the *Irish* to the *North American* coast, was finally laid down, it was found impossible to maintain electric communication by

1861.

PATERSON
v.
HARRIS.

means of it, sufficient for telegraphic purposes, and the working of the telegraph was, at all events for the time, abandoned. A great depreciation in the value of the shares of the Company necessarily followed; and the principal question in the case is whether the plaintiff is entitled to recover on this policy in respect of this loss.

The cause of the failure was, beyond doubt, the imperfect insulation of the wire, arising from some defect, in one or more places, in the outer covering by which the wire is protected from external contact; and according to the finding of the jury, which was well warranted by the evidence, and is not complained of, this defect was occasioned by accident prior to the shipment of the cable and the commencement of the risk "aggravated by the action of the sea." Understood by the light of the evidence of the plaintiff's witnesses (none were called by the defendant) and of the contention of the counsel at the trial, this finding of the jury must be taken to have reference to the *chemical* action of the sea water on the interior of the cable, to which, by the defect of the outer covering at the time the cable was immersed in the water, it was enabled to penetrate, and not to any mischief done by the violence or *mechanical* action of the sea. This being so, we are of opinion that this is not an injury which can properly be referred to "perils of the seas," under which head of damage it was contended for the plaintiff that the loss fell. We are of opinion that an injury of this nature, not arising from the external violence or mechanical action of the winds or waves, but which was the natural and necessary consequence of the ordinary action of the sea water on the cable, in the state in which it was when immersed in the sea, is not comprehended in the perils insured against. The injury, so far as the damage occasioned by the sea is concerned was the in-

evitable consequence of the immersion of the cable in its then state in the sea water. But the purpose of insurance is to afford protection against contingencies and dangers which may or may not occur; it cannot properly apply to a case where the loss or injury must inevitably take place in the ordinary course of things. The wear and tear of a ship, the decay of her sheathing, the action of worms on her bottom, have been properly held not to be included in the insurance against perils of the seas, as being the unavoidable consequences of the service to which the vessel is exposed. The insurer cannot be understood as undertaking to indemnify against losses which, in the nature of things, must necessarily happen.

For these reasons, we are of opinion that the plaintiff is not entitled to recover in respect to this portion of his claim.

A further question arises on a second head of claim in respect of a partial loss. In the laying down of the cable, 373 miles of cable were lost under circumstances which, it is admitted, would come under the head of perils of the seas. The question is, whether the plaintiff is entitled to recover in respect of this loss, and, if so, upon what principle the damages should be assessed.

It was contended for the defendant, that, as the value of a share in the Company would have risen higher than the estimated value fixed by the policy if the cable, actually laid down, could have been successfully worked, the partial loss of a portion of cable could not be considered as included in an insurance on the share. But the obvious answer is, that the loss of a quantity of cable belonging to the Company must necessarily be, pro tanto, a loss on the capital of the Company, and must so far tend to diminish the value of each share.

It was further contended that the defendant was pro-

1861.

PATERSON
V.
HARRIS.

1861.

PATERSON

v.

HARRIS.

tected against this part of the plaintiff's claim by the memorandum of warranty against partial loss; inasmuch as the loss here could not amount to 3*l.* per cent. on the total value of this share.

We at first doubted whether the warranty against partial average would apply to this case, but on further reflexion; considering that the insurance, though nominally on the share, yet for reasons which we shall afterwards more fully explain, is practically an insurance on the cable, as being the tangible substance in respect of which alone the share could be exposed to the risk of sea damage; we have come to the conclusion that the warranty against partial average applies, and consequently that, unless a loss of 3*l.* per cent. has been sustained, the plaintiff cannot recover.

In order to determine this question, as well as the principle on which the per centage of the loss is to be fixed, it becomes necessary to inquire more precisely what is the exact meaning of the contract contained in the policy on which this action is brought. The insurance is expressed to be "at and from the *United Kingdom*, say from *London* and wheresoever the risk may commence, to the *Atlantic Ocean*, and at and thence by or in one or more ship or ships, or steamer or steamers, to the place or places of destination, both in the *United Kingdom* ^{and} the continent, island or peninsula of *America* ^{or} ^{and} the *British* or other possessions of *America*, including ^{or} and containing all and every accident, danger, and risk that may be incurred at sea or on land, in all or any boats, ships, and craft whatsoever or wheresoever, until the final complete and successful laying down of the *Atlantic* Telegraph cable from shore to shore." The usual blank for the name of the ship is filled up thus, "any ship or ships, or steamer or steamers, or craft as

above," and in the valuation clause the subject of insurance is to be taken as "on one 1000*l.* share in *The Atlantic Telegraph Company*. Said share valued at 1100*l.* In case of loss, the part saved to be sold or appraised for the benefit of the underwriters." Attached to the policy is the slip which has been already referred to, by which it is declared that "It is understood and agreed that this insurance shall cover and include the successful working of the cable when laid down." Now it is obvious that the share in the Company itself was never capable of being put on board ships or steamers; nor was it directly liable to be lost in consequence of the maritime risks; nor by any reasonable construction could the provision, that "in case of loss the part saved" should "be sold or appraised for the benefit of the underwriters," be applied to the share in the Company; while, on the other hand, the proprietor of that share had an interest in the cable to which all of these phrases are applicable. It appears to us, therefore, that, on the true construction of this policy, the underwriters contract to indemnify the owner of that share against any losses arising to his interest in the cable, which interest is, by agreement, valued at 1100*l.*

As soon as this is ascertained, this part of the case becomes mere matter of calculation. The value of the whole cable that ever was exposed to peril, including the portion lost, must be ascertained according to its cost when shipped free on board. That is the value of the whole that was at risk; and the proportion between that value and the loss actually incurred by the perils insured against gives the per centage payable by each underwriter on his subscription.

In order to ascertain the amount of the loss, a distinc-

1861.

 PATERSON
 V.
 HARRIS.

1861.

 PATERSON
 v.
 HARRIS.

tion may properly be taken. That portion of the cable which was lost in the first attempt to lay down the cable and which it became necessary to replace by new cable should be estimated at the cost of the substitute cable. For, as far as that is concerned, the parties involved have suffered the loss of the whole price which they paid to replace it. As regards that portion of the cable which was taken out as superfluous cable, by way of provision against accident, it may be reasonable to consider how far such cable, if not lost, would have been depreciated in marketable value by having been in the hold of a vessel or by other circumstances. These are subjects which a referee conversant with marine insurance (the parties having agreed that if the arbitrator shall be held entitled to a verdict in respect of the loss, the damage should be assessed out of Court) will probably have no difficulty in dealing with. The arbitrator, estimating the per centage on this portion of the cable, should find that it amounts to less than 3*l.* per cent. as, on the construction we have put on this portion of the assurance on the cable, that is on goods, the weight of the cable as we have already stated, in our opinion appears to be the amount the defendant will be entitled to the verdict.

If the loss amounts to more than 3*l.* per cent. the verdict must be entered for the plaintiff for the amount of the loss.

The following rule was then drawn up:—

“Upon reading, &c. and upon hearing, &c. the Court ordered that the arbitrator appointed by the parties should assess the damages as to the 373 miles of cable, on the principle laid down by the Court, and if he found that the damage so assessed amounts to or exceeds

cent., the verdict is to be entered for the plaintiff as to such portion of the amount so found as the defendant's subscription bears to the whole sum insured by the policy, and costs 40s.; but if such damages amount to less than 3l. per cent. then the verdict is to be entered for the defendant."

1861.

PATERSON
v.
HARRIS.

CANDLISH and another *against* SIMPSON and another.

Friday,
May 31st.

*Alehouse
licence.
Town corpo-
rate.*
9 G. 4. c. 61.

Where a borough named in Schedule A. to stat. 5 & 6 W. 4. c. 76. has a separate commission of the peace, but no separate Court of Quarter Sessions, the county justices have exclusive jurisdiction to grant alehouse licences within the borough under stat. 9 G. 4. c. 61.

THE following case was stated for the opinion of the Court in an action against the defendants for disturbing the plaintiffs in the exercise of their right and franchise as two justices of the peace for the borough of *Sunderland*, in the county of *Durham*; the plaintiff *Candlish* being also Mayor of the said borough.

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At the passing of The Municipal Corporations Act, the parish of *Sunderland near the Sea*, and the said several townships of *Bishopwearmouth*, *Bishopwearmouth Panns*, *Monkwearmouth* and *Monkwearmouth Shore*, formed part of the North Petty Sessional Division of *Easington Ward*,

1861.

CANDLISH

v.

SIMPSON.

n the county of *Durham*, and ever since the passing of the said Act, and thence hitherto, have been, and still are, rated to the several rates and assessments levied and assessed by Her Majesty's justices of the peace in and for the county of *Durham*, upon the several parishes and townships within and comprising the said county, except the rate levied for the maintenance of the police of the county.

By an order of General Quarter Sessions, made the 18th of *October*, 1841, under the Act 9 G. 4. c. 43., for the county of *Durham*, the said parish and townships forming the borough of *Sunderland* were, together with the townships of *Burdon*, *Dawdon*, *Ford*, *Fulwell*, *Hylton*, *Ryhope*, *Silksworth*, *Seaham*, *Southwick* and *Tunstall*, formed into a Petty Sessional Division, called the *Sunderland* Petty Sessional Division of *Easington Ward*, and by another order of General Quarter Sessions, made on the 3d day of *January* 1859, for the county of *Durham*, the said townships of *Dawdon* and *Seaham* were, with other townships, formed into the *Seaham* Petty Sessional Division of *Easington Ward*. With this exception, the *Sunderland* Petty Sessional Division now remains as formed by the order of the 18th *October*, 1841.

No separate Court of Quarter Sessions has ever been held in and for the borough of *Sunderland*, nor has there ever been any gaol or house of correction in the said borough.

From 1836 downwards, to the present time, the council of the borough has appointed various persons successively to act as high constables in and for the borough.

On the 15th *September*, 1836, a separate commis-

sion of the peace was for the first time, under the provisions of the Act 5 & 6 W. 4. c. 76., granted by His late Majesty to the borough, and, ever since that time, justices assigned to act as justices of the peace in and for the borough have continually been appointed under renewed commissions, and such justices have acted as such in and for the borough, and are hereafter called "the borough justices." The usual Petty Sessions in and for the borough was, after the grant of the said commission of the peace, held by the Mayor and other borough justices, and other justices, being justices of the peace acting in and for the county of *Durham*, on each day in the week until the year 1842, when the council of the borough erected a police court as required by the Act 5 & 6 W. 4. c. 76. s. 100.; subsequent to this the Mayor and other borough justices have held their Petty Sessions, on each day, in the police court, and, at the same Sessions, certain of the justices for the county of *Durham*, acting in and for the *Sunderland* Division of *Easington Ward*, several of whom are also in the borough commission, have acted with the Mayor and other borough justices; there being sixteen justices in the commission for the borough, of whom nine are also acting county justices.

The usual Petty Sessions in and for the North Division and the *Sunderland* Division of *Easington Ward* respectively were, previous to and after the grant of the borough commission of the peace, held every *Saturday* in the justice room of the Exchange Buildings, until the erection of the police courts in 1842, and have since that time been holden in such police court. The justices so acting are hereinafter called "the county bench of justices."

1861.

 CANDLISH
 V.
 SIMPSON.

1861.

CANDLISH
v.
SIMPSON.

Informations against publicans licenced for houses situate in the borough, for offences committed by them contrary to the tenor of their licenses, have always been adjudicated upon by the justices sitting daily at the police court in Petty Sessions for the borough, such justices being as aforesaid, besides the Mayor of the borough, those justices who are in the commission as well for the borough as for the county, and those who are in the commission for the borough only, and those who are in the commission for the county only; and the Court so formed is hereinafter called "the borough bench of justices."

On the 24th of *August*, 1837, "the borough bench of justices" held a General Annual Licencing Meeting, in pursuance of the Act 9 *Geo. 4. c. 61.*, specially for the borough (the precept for holding such meeting having been directed to the borough high constable), and granted alehouse licences for the borough, and, from 1837 to 1850 inclusive, held such meetings and granted such licences to persons applying for the same.

On the 27th of *August*, 1851, the county bench of justices acting in and for the *Sunderland* Petty Sessional Division, held, at the police Court in *Sunderland*, a General Annual Licencing Meeting, in pursuance of the Act 9 *G. 4. c. 61.* The said borough justices and county justices did not hold, in that year, separate licencing meetings, but held one court only, at which the Mayor of the borough presided, and all applications for licences to keep inns and alehouses, within the borough of *Sunderland*, were heard and adjudicated upon by the Court, at which the said borough justices and the said county justices acted and voted. At this meeting none of the alehouse licences granted were signed by the

justices who were justices only for the borough, but by the justices for the county, and all such licences shewed on the face of them that they were granted by the justices of the county of *Durham*, acting in and for the *Sunderland* division of *Easington Ward*. This mode was adopted by the then borough justices because doubts were suggested to them as to their right to hold a separate licencing meeting for the borough. The same course was followed in 1852, 1853, 1854, 1855, 1856, 1857 and 1858, with the exception that the county justices refused to allow the Mayor of the borough to preside while the bench were hearing applications for licences within the borough ; and under these circumstances, and in consequence of the said doubts, the mayor and borough justices considered themselves as virtually excluded, and ceased to attend the licencing meetings convened by the county justices.

On the 18th *June*, 1859, the county justices acting in and for the *Sunderland* Division of *Easington Ward*, by their precept in writing, bearing date that day, and directed to the high constable of the *Sunderland* Division of *Easington Ward*, appointed the 27th *August*, at 11 o'clock, to be the day and hour, and the police court *Bishop Wearmouth* to be the place, for holding the General Annual Licencing Meeting, under the Act 9 *G.* 4. c. 61., for the Division, which Division included the borough of *Sunderland* as before mentioned. No appointment for a General Annual Licencing Meeting for the borough was made by name, but the appointment was made in general words for the Division ; and due notices of such meeting were given and served by the high constable of the Division according to the provisions of the Act 9 *G.* 4. c. 61. On the 29th

1861.

 CANDLISH
 V.
 SIMPSON.

1861.
CANDLISH
v.
SIMPSON.

July, 1859, the said borough bench of justices, by their precept in writing dated that day, and directed to the high constable of the said borough, appointed the said 27th of *August*, at 11 o'clock of the forenoon, to be the day and hour, and the said police court to be the place, upon and in which the General Annual Licencing Meeting under the said Act 9 G. 4. c. 61., in and for the borough of *Sunderland*, should be held; and *Joseph Stainsby*, acting as high constable for the said borough, caused due notice to be given and served according to the provisions of the said Act.

On the day and at the hour last aforesaid, at the said police court, the plaintiff, *John Candlish*, being then as aforesaid Mayor of the said borough, and the plaintiff *Joseph Brown*, being a justice of the peace for the borough only, with certain other justices acting in and for the said borough, and being duly qualified for the purpose according to the said Act 9 G. 4. c. 61., and then and there sitting as the justices of the borough bench, took part in holding, according to appointment, a General Annual Licencing Meeting for the borough, and, together with such other justices for the borough, granted several alehouse licences, and, but for the acts and claims of the defendants, would have continued to hold such meeting and to grant other alehouse licences in pursuance of their right, and in execution of their duty, as justices of the peace in and for the borough.

The defendants, being justices in and for the said county of *Durham*, and being there, with other justices of the county bench, acting in and for the said *Sunderland* Division, present in the said police court, prevented the plaintiffs and the other borough justices, then present, from holding the said meeting, and required and

compelled them to desist, and the defendants and the other county justices claimed to be themselves, as county justices, exclusively entitled to hold the meeting.

1861.

CANDLISH
V.
SIMPSON.

The defendants, and other county justices present, then and there proceeded to hold, and held, a meeting, as a General Annual Licencing Meeting, in and for the said *Sunderland* Division; and the defendants and the other county justices excluded the plaintiffs and the other borough justices from, and would not suffer the plaintiffs and other borough justices present to take part in the said meeting, or vote in determination of the questions raised thereat.

The plaintiffs and the borough justices present then read in Court, and entered in their minute book, a protest against the county bench of justices granting, or having a right to grant, any licences for keeping inns and alehouses within the borough; but, notwithstanding this protest, the defendants and the other county justices heard and adjudicated upon a great number of applications by persons living in the said borough for licences to keep inns and alehouses, and granted such licences to a great number of them.

The defendants say that, acting for themselves and the other county justices, under the circumstances stated in the case they were justified in their acts.

The question for the Court is, under the circumstances above stated, Had either the county justices or the borough justices exclusive jurisdiction for the purpose of granting alehouse licences for the borough of *Sunderland*?

If the Court should be of opinion that the county justices had such exclusive jurisdiction, judgment of

1861. non pros. was to be entered for the defendants, without costs of suit.

CANDLISH
v.
SIMPSON.

If the Court should be of opinion that the borough justices had such exclusive jurisdiction, or that they and the county justices had concurrent jurisdiction, then judgment was to be entered for the plaintiffs for 5*l.* without costs of suit.

Manisty, for the plaintiffs. The borough justices have either concurrent jurisdiction with the county justices, or they have exclusive jurisdiction to grant alehouse licences, within the borough of *Sunderland*, under stat. 9 *G.* 4. c. 61., An Act of Parliament passed in the same session, 9 *G.* 4. c. 43., contains the regulations by which divisions of a county become petty sessional divisions, and under which the justices of a county hold special sessions in those divisions. (He referred to sects. 1, 4 and 6.) And then, by stat. 9 *G.* 4. c. 61. s. 1., a special session of the justices of the peace, to be called the General Annual Licencing Meeting, is to be held "in every division of every county . . . and in every liberty, division of every liberty, county of a city, county of a town, city, and town corporate;" and "it shall be lawful for the justices acting in and for such county or place, assembled at such meeting or at any adjournment thereof, and not as hereinafter disqualified from acting, to grant licences for the purposes aforesaid to such persons as they the said justices shall, in the execution of the powers herein contained and in the exercise of their discretion, deem fit and proper." By sect. 2, "in every such division or place as aforesaid there shall be holden, twenty one days at the least before each such general annual licencing meeting, a

petty session of the justices acting for such county or place, the majority of whom then present shall, by a precept under their hands, appoint the day, hour, and place upon and in which such general annual licencing meeting for such division or place shall be holden; and shall direct such precept to the high constable of the division or place for which such meeting is to be holden, requiring him . . . to order the several petty constables or other peace officers within his constablewick" to give notice of the meeting. In this section the word "place" includes a "town corporate," which is specified in sect. 1; and therefore the justices of a town corporate, who are justices "acting for such place," have power to appoint a general annual licencing meeting for the borough. [Crompton J. Three states of circumstances may exist in a borough: 1. Where the commission of the peace for the borough contains a ne intromittant clause, and then the borough justices have exclusive jurisdiction. 2. Where there is no such clause, and then the borough and the county justices have concurrent jurisdiction, as in *Rex v. Sainsbury (a)*, which decided that whichever set of justices first appoints a meeting to grant licences, their jurisdiction attaches so as to exclude the other from appointing a subsequent meeting. 3. Where the two sets of justices act together, and so make a borough-county bench; but that state of things seems not to be within stat. 9 G. 4. c. 61. There are also towns corporate which have no commission of the peace: the statute could not apply to them. Wightman J. The town corporate, in sect. 1, must be a town corporate which has justices of the peace acting for it.] Sect. 7 empowers the county justices, under certain circum-

1861.

 CANDLISH
v.
SIMPSON.

(a) 4 T. R. 451.

1861.

 CANDLISH
 v.
 SIMPSON.

stances, to act within the borough: "Whenever at any of the meetings to be holden as aforesaid for any liberty, county of a city, county of a town, city, or town corporate, there shall not be present at least two justices acting in and for any such liberty, county of a city, county of a town, city, or town corporate, who are not disqualified, it shall be lawful for the justices acting in and for the county or counties adjoining to such liberty, county of a city, county of a town, city, or town corporate, and not disqualified from acting, to act within such liberty or place, and with the justice or justices thereof, not as hereinbefore disqualified, who shall be present at any such meeting as aforesaid, for the purpose of granting or transferring licences under, or of hearing complaints as to offences against, this Act; any law, custom, or usage to the contrary notwithstanding." [Crompton J. That section was necessary to enable the county justices to act in a borough, notwithstanding the commission of the peace for the borough contained a ne intromittant clause, in cases where there was not a sufficient number of borough justices.] It shews that the Legislature intended that the time and place for holding licencing meetings should be appointed by the borough justices. [Crompton J. Only where the time and place had not been before appointed by justices of the county.] Sect. 111 of stat. 5 & 6 W. 4. c. 76., which gives to county justices the jurisdiction of borough justices, in boroughs to which a separate Court of Quarter Sessions shall not have been granted, points at a concurrent jurisdiction. In *Brown*, app., v. *Nicholson*, resp. (a), it was decided that an alehouse licence granted at a licencing meeting on the 7th September by borough justices, in a borough not having a separate Court of Quarter

(a) 5 C. B. N. S. 468.

Sessions, was good, notwithstanding the county justices, who had concurrent jurisdiction, had before appointed a licencing meeting to be held on the following day. [*Crompton J.* That case is open to discussion, because there could be no appeal against the judgment.] *Reg. v. Dale (a)*, which was founded on the interpretation clause, sect. 37 of stat. 9 *G. 4. c. 61.*, was cited in that case, and explained by the Court. [*Wightman J.* By the proviso to sect. 27 of that Act the appeal against the decision of the borough justices may be to the Quarter Sessions for the county. *Cockburn C. J.* Suppose a borough is within two counties: if the county justices have the jurisdiction claimed for them, the justices of two different counties would be present at the meeting; whereas the borough justices would be a single body acting for the whole borough.]

Lush, for the defendants. Stat. 9 *G. 4. c. 61.* gives exclusive jurisdiction to the county justices to grant ale house licences in a borough, unless the borough has a separate Court of Quarter Sessions. The term "town corporate," in sect. 1, must receive a limited sense, because at the time of the passing of that Act towns corporate had no justices of the peace. The Municipal Corporations Act, 5 & 6 *W. 4. c. 76. s. 98.*, first introduced boroughs having justices of the peace by commission. Sect. 4 of stat. 9 *G. 4. c. 61.*, which authorizes the Quarter Sessions to do various acts, cannot apply to a town corporate which has no Court of Quarter Sessions. And in all the subsequent sections of that Act the word "place" means a town corporate capable of carrying out the provisions of the statute, for which purpose it must have

1861.

 CANDLISH
v.
SIMPSON.

(a) *Dears. & P. C. C. 37.*

1861.

 CANDLISH
 v.
 SIMPSON.

a Court of Quarter Sessions. Sect. 2 requires the precept of the justices for holding the meeting to be directed "to the high constable of the division or place," and there is properly no such officer in boroughs which have not a Court of Quarter Sessions. (He cited *James v. Green* (a) and *Weatherhead v. Drewry* (b). [*Crompton J.* The office of high constable is very ancient. But by the interpretation clause, sect. 37, the words "high constable" "shall be deemed to include any person acting as such."] Sect. 21, which provides that, upon a proceeding against a licenced person for a third offence against the tenor of his licence, the hearing of the charge may be adjourned to the General or Quarter Sessions of the peace then next ensuing to be inquired of before a jury, and sect. 22, which empowers the Quarter Sessions to order the constable of the parish or place in which the licenced house is situate to carry on the proceedings, and to order the treasurer "of the county or place in and for which such justices shall then act to pay the expences of the prosecution," cannot be carried out except in a borough having a Court of Quarter Sessions. Sect. 21 shews that the justices who adjourn the hearing of a case to the Quarter Sessions are members of the Court of Quarter Sessions. Sect. 22 prescribes certain duties to the treasurer and the clerk of the peace, and there is no such officer as a clerk of the peace in a borough which has not a Court of Quarter Sessions. Sect. 25 assumes that there is a gaol for the county or place for which the justices granting the licences act. (He also referred to sect. 26.) By sect. 27, any person who thinks himself aggrieved by any act of any justice may appeal to the Quarter Sessions "holden for the

(a) 6 T. R. 228.

(b) 11 East, 168.

county or place wherein the cause of such complaint shall have arisen." "Provided also, that when any cause of complaint shall have arisen within any liberty, county of a city, county of a town, city, or town corporate, it shall be lawful for the person who shall think himself so as aforesaid aggrieved to appeal against any such act as aforesaid, if he shall think fit, to the Quarter Sessions of the county within or adjoining to which such liberty or place shall be situate, subject to all the provisions hereinbefore contained." (He also referred to sects. 28 and 33.) In *Brown*, app., v. *Nicholson*, resp., (a) the justices of the borough had always, both before and since The Municipal Corporations Act, granted licences within the borough. [*Blackburn J.* There is a misprint in the judgment in that case, p. 478: where "separate commission of the peace" occurs instead of "separate Court of Quarter Sessions."] In *Reg. v. Dale* (b), on a review of all the sections in which the word "place" occurs, the Judges held that the word "place," in sect. 26, means a borough having a Court of Quarter Sessions. It was not intended that the county and borough justices should act concurrently in granting licences. [*Cockburn C. J.* Although both classes of justices are within the terms of sect. 1, and therefore it might seem that they had concurrent jurisdiction to grant licences within a borough, yet, looking at sect. 4 and the subsequent sections, the machinery for working out the licencing system is wholly wanting in a borough unless it has a Court of Quarter Sessions and officers deriving their authority from it; and therefore we must read the term "town corporate," in sect. 1, as "town corporate having a separate Court of Quarter Sessions." To prevent the unseemliness of the two sets of justices

1861.

 CANDLISH
v.
SIMPSON.

(a) 5 C. B. N. S. 468.

(b) *Dears. & P. C. C.* 37.

1861.

 PATERSON
 v.
 HARRIS.

tion may properly be taken. That portion of the cable which was lost in the first attempt to lay down the cable, and which it became necessary to replace by new cable, should be estimated at the cost of the substituted cable; for, as far as that is concerned, the parties interested have suffered the loss of the whole price which they paid to replace it. As regards that portion of the lost cable which was taken out as superfluous cable, by way of a provision against accident, it may be reasonable to consider how far such cable, if not lost, would have been depreciated in marketable value by having been coiled in the hold of a vessel or by other circumstances. These are subjects which a referee conversant with matters of insurance (the parties having agreed that if the plaintiff shall be held entitled to a verdict in respect of partial loss, the damage should be assessed out of Court), will probably have no difficulty in dealing with. If the arbitrator, estimating the per centage on this principle, should find that it amounts to less than 3*l.* per cent., then, as, on the construction we have put on this policy it is an assurance on the cable, that is on goods, the warranty, as we have already stated, in our opinion applies, and the defendant will be entitled to the verdict.

If the loss amounts to more than 3*l.* per cent., then the verdict must be entered for the plaintiff for the amount of the loss.

The following rule was then drawn up :—

“Upon reading, &c. and upon hearing, &c., it is ordered that the arbitrator appointed by the parties do assess the damages as to the 373 miles of cable, upon the principle laid down by the Court, and if he find that the damage so assessed amounts to or exceeds 3*l.* per

cent., the verdict is to be entered for the plaintiff as to such portion of the amount so found as the defendant's subscription bears to the whole sum insured by the policy, and costs 40s.; but if such damages amount to less than 3l. per cent. then the verdict is to be entered for the defendant."

1861.

PATERSON
v.
HARRIS.

CANDLISH and another *against* SIMPSON and another.

Friday,
May 31st.

Where a borough named in Schedule A. to stat. 5 & 6 W. 4. c. 76. has a separate commission of the peace, but no separate Court of Quarter Sessions, the county justices have exclusive jurisdiction to grant alehouse licences within the borough under stat. 9 G. 4. c. 61.

Alehouse
licence.
Turn corpo-
rate.
9 G. 4. c. 61.

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1861.

PATERSON
v.
HARRIS.

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1861.

PATERSON
v.
HARRIS.

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Alehouse
licence.
Town corpora-
rate.
9 G. 4. c. 61.

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1861.

PATERSON

v.

HARRIS.

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1861.

PATERSON
v.
HARRIS.

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1861.

BARTLEY
v.
HODGES.

payable, the defendant says that after the alleged debts became due he accepted, and delivered so accepted to the plaintiff, a bill of exchange dated the 4th day of *October* 1851, drawn by the plaintiff on the defendant for the payment to the order of the plaintiff of 150*l.* at one month after date, for and on account and in payment and satisfaction of the alleged debts, and that the plaintiff then accepted the said bill of the defendant for and on account and in such payment and satisfaction as aforesaid."

Replication. "The plaintiff says that the said bill of exchange in the said first count mentioned was an inland and not a foreign bill of exchange, and that the causes of action in the declaration mentioned, and each of them, arose and accrued to the plaintiff within this kingdom of *England*, and not in the said colony, or in any place out of *England*."

To this replication the defendant demurred, and the plaintiff joined in demurrer.

Joseph Brown, in support of the demurrer.—The facts disclosed on this record shew a valid discharge of the defendant from the debts for which the plaintiff sues. The effect of a declaration of insolvency and a judicial transfer of property under it is to divest the party of his personal property all over the world, to deprive him of all debts due to him, and to discharge him from all debts due by him; *Story. Conf. Laws*, §§ 408-9. 5th ed. Where indeed the insolvency takes place in a foreign country it has no effect here except by the comity of nations, but it is otherwise where the insolvency takes place under the law of a colony constituted by the imperial parliament.

The colony of *Victoria* originally formed part of *New South Wales*, but by stat. 13 & 14 *Vict. c. 59.*, "For the better government of her Majesty's *Australian colonies*," it was constituted a separate colony, with "a separate legislative council," sects. 1, 2; the existing laws to remain in force, sect. 25; and a Supreme Court of justice to be erected, sects. 28, 29. By 18 & 19 *Vict. c. 55.*, a constitution was given to the colony; by sect. 40 of which constitution "all laws and statutes which at the time of the passing of this Act shall be in force within *Victoria* shall remain and continue to be of the same force, authority, and effect as if this Act had not been made, except in so far as the same are repealed or varied by this Act, or in so far as the same shall or may hereafter, by virtue and under the authority of this Act, be repealed or varied by any Act or Acts of the legislature of *Victoria*." In *Edwards v. Ronald (a)* it was held that a certificate of conformity to the bankrupt law, obtained in *England*, was a bar to an action for a debt contracted by the bankrupt in *Calcutta* previously to his bankruptcy, although the creditor was resident at *Calcutta*, and had no notice of the commission. [*Blackburn J.* There is the marked distinction between that case and the present that there the discharge was under an act of the imperial legislature.] In *Quelin v. Moisson*, in a note to the former case, p. 266; where a *French* bankrupt, who had assigned all his property to his assignees under a *French* commission of bankruptcy, had given a note of hand in *France*, which was proved under the bankruptcy, and afterwards indorsed to a third party, it was held that the bankrupt could not be sued on it.

1861.

 BARTLEY
v.
HODGES.
(a) 1 *Knapp P. C. C.* 259.

1861.

CANDLISH
v.
SIMPSON.

July, 1859, the said borough bench of justices, by their precept in writing dated that day, and directed to the high constable of the said borough, appointed the said 27th of *August*, at 11 o'clock of the forenoon, to be the day and hour, and the said police court to be the place, upon and in which the General Annual Licencing Meeting under the said Act 9 G. 4. c. 61., in and for the borough of *Sunderland*, should be held; and *Joseph Stainsby*, acting as high constable for the said borough, caused due notice to be given and served according to the provisions of the said Act.

On the day and at the hour last aforesaid, at the said police court, the plaintiff, *John Candlish*, being then as aforesaid Mayor of the said borough, and the plaintiff *Joseph Brown*, being a justice of the peace for the borough only, with certain other justices acting in and for the said borough, and being duly qualified for the purpose according to the said Act 9 G. 4. c. 61., and then and there sitting as the justices of the borough bench, took part in holding, according to appointment, a General Annual Licencing Meeting for the borough, and, together with such other justices for the borough, granted several alehouse licences, and, but for the acts and claims of the defendants, would have continued to hold such meeting and to grant other alehouse licences in pursuance of their right, and in execution of their duty, as justices of the peace in and for the borough.

The defendants, being justices in and for the said county of *Durham*, and being there, with other justices of the county bench, acting in and for the said *Sunderland* Division, present in the said police court, prevented the plaintiffs and the other borough justices, then present, from holding the said meeting, and required and

compelled them to desist, and the defendants and the other county justices claimed to be themselves, as county justices, exclusively entitled to hold the meeting.

1861.

 CANDLISH
 V.
 SIMPSON.

The defendants, and other county justices present, then and there proceeded to hold, and held, a meeting, as a General Annual Licencing Meeting, in and for the said *Sunderland* Division; and the defendants and the other county justices excluded the plaintiffs and the other borough justices from, and would not suffer the plaintiffs and other borough justices present to take part in the said meeting, or vote in determination of the questions raised thereat.

The plaintiffs and the borough justices present then read in Court, and entered in their minute book, a protest against the county bench of justices granting, or having a right to grant, any licences for keeping inns and alehouses within the borough; but, notwithstanding this protest, the defendants and the other county justices heard and adjudicated upon a great number of applications by persons living in the said borough for licences to keep inns and alehouses, and granted such licences to a great number of them.

The defendants say that, acting for themselves and the other county justices, under the circumstances stated in the case they were justified in their acts.

The question for the Court is, under the circumstances above stated, Had either the county justices or the borough justices exclusive jurisdiction for the purpose of granting alehouse licences for the borough of *Sunderland*?

If the Court should be of opinion that the county justices had such exclusive jurisdiction, judgment of

1861.
 CANDLISH
 v.
 SIMPSON.

non pros. was to be entered for the defendants, without costs of suit.

If the Court should be of opinion that the borough justices had such exclusive jurisdiction, or that they and the county justices had concurrent jurisdiction, then judgment was to be entered for the plaintiffs for 5*l.* without costs of suit.

Manisty, for the plaintiffs. The borough justices have either concurrent jurisdiction with the county justices, or they have exclusive jurisdiction to grant alehouse licences, within the borough of *Sunderland*, under stat. 9 *G.* 4. c. 61., An Act of Parliament passed in the same session, 9 *G.* 4. c. 43., contains the regulations by which divisions of a county become petty sessional divisions, and under which the justices of a county hold special sessions in those divisions. (He referred to sects. 1, 4 and 6.) And then, by stat. 9 *G.* 4. c. 61. s. 1., a special session of the justices of the peace, to be called the General Annual Licencing Meeting, is to be held "in every division of every county . . . and in every liberty, division of every liberty, county of a city, county of a town, city, and town corporate;" and "it shall be lawful for the justices acting in and for such county or place, assembled at such meeting or at any adjournment thereof, and not as hereinafter disqualified from acting, to grant licences for the purposes aforesaid to such persons as they the said justices shall, in the execution of the powers herein contained and in the exercise of their discretion, deem fit and proper." By sect. 2, "in every such division or place as aforesaid there shall be holden, twenty one days at the least before each such general annual licencing meeting, a

petty session of the justices acting for such county or place, the majority of whom then present shall, by a precept under their hands, appoint the day, hour, and place upon and in which such general annual licencing meeting for such division or place shall be holden; and shall direct such precept to the high constable of the division or place for which such meeting is to be holden, requiring him . . . to order the several petty constables or other peace officers within his constablewick" to give notice of the meeting. In this section the word "place" includes a "town corporate," which is specified in sect. 1; and therefore the justices of a town corporate, who are justices "acting for such place," have power to appoint a general annual licencing meeting for the borough. [Crompton J. Three states of circumstances may exist in a borough: 1. Where the commission of the peace for the borough contains a ne intronittant clause, and then the borough justices have exclusive jurisdiction. 2. Where there is no such clause, and then the borough and the county justices have concurrent jurisdiction, as in *Rex v. Sainsbury* (a), which decided that whichever set of justices first appoints a meeting to grant licences, their jurisdiction attaches so as to exclude the other from appointing a subsequent meeting. 3. Where the two sets of justices act together, and so make a borough-county bench; but that state of things seems not to be within stat. 9 G. 4. c. 61. There are also towns corporate which have no commission of the peace: the statute could not apply to them. *Wightman* J. The town corporate, in sect. 1, must be a town corporate which has justices of the peace acting for it.] Sect. 7 empowers the county justices, under certain circum-

1861.

 CANDLISH
 V.
 SIMPSON.

(a) 4 T. R. 451.

1861.

HARROD
v.
WORSHIP

C. J., *Crompton and Blackburn JJ.*, that a right of way was not given by sect. 76 of The *Great Yarmouth Haven Act*, 1835, and that the section only applied where a right of way existed, and therefore that the appellant was not properly convicted: *Wightman J.* dissented, on the ground that the section was intended to secure a passage free from obstruction along the sides of the Haven.

CASE stated under stat. 12 & 13 *Vict. c. 45. s. 11.*, upon an appeal to the Quarter Sessions of the borough of *Great Yarmouth* against a conviction of the appellant by two justices of the borough, on the 12th *August*, 1858, under The *Great Yarmouth Haven, Bridge, and Navigation Act*, 1835, 5 & 6 *W. 4. c. xlix.*, for having unlawfully placed on a certain space of ground immediately adjoining to the Haven of *Great Yarmouth*, and within the space of ten feet from high water mark certain goods and articles, to wit, three fishing vessels, so as to obstruct the free and commodious passage through and over the said space of ground, contrary to the said Act of Parliament.

“The conviction took place under the 76th section of the *Great Yarmouth Haven, Bridge, and Navigation Act*, 1835, by which it is, amongst other things, enacted that, if any person shall place on any space of ground immediately adjoining to the Haven of *Great Yarmouth*, and within the space of ten feet from high water mark, any goods or articles whatsoever, so as to obstruct the free and commodious passage over the same, every person so offending shall forfeit any sum not exceeding 5*l.* for every such offence.

The appellant is a boat builder and occupies a boat building yard in *South Town*, within the said Borough, on the west side of the river *Yare*, between the bridge over the *Yare* at *Great Yarmouth* and the point of confluence of the *Yare* and *Bure* hereinafter mentioned. The yard in front comes down to the river, and at the back opens into a public road called the *Lime Kiln*

Road. [A plan was referred to in which the road was laid down.] There is no fence either at the front or the back of the yard; and it slopes to the river so that the tide flows up, and boats and fishing vessels built or repaired there can be launched into or hauled up from the river. Previous to and at the time of the conviction three fishing vessels were lying in the yard on the part immediately adjoining the river and within the space of ten feet from high water mark, being the space of ground mentioned in the conviction. It was admitted that they had been placed there by the appellant; and that they obstructed the free and commodious passage over the said space of ground.

"The river forming the Haven is called the *Yare*, flowing" from the city of *Norwich* through the town of *Yarmouth* to the sea. Part of this river above the town is called the *Breydon Water*. The *Waveney* falls into the *Breydon Water* about four miles from, and the *Bure* into the *Yare* close by, the town. A bridge crosses the river about the middle of the town, connecting the two counties of *Norfolk* and *Suffolk*. The place in question is on the west side of the river to the northward of the bridge and before coming to *Breydon Water*. The town for nearly two miles lies on the east side of the river, and was formerly walled in next the sea, and was the old town. On this side only vessels coming from the sea were accustomed to moor and to take in and discharge their cargoes, and on that side there are warehouses built to the edge of the quay. The land on the west side of the river was formerly marsh land, but warehouses and other buildings have been built upon it (many of them during the last thirty years), northward from the bridge, and some of the land is used as docks to a place called *Lady's Haven*, and ves-

1861.

HARROD
v.
WORSHIP.

1861.

HARROD
v.
WORSHIP.

sels deliver and take in goods at such warehouses; and vessels are hauled up and launched at the docks passing through the bridge, which is an opening bridge. There are wharves or, as they are called, quay heads in front of these warehouses and buildings, leaving a space of about ten feet between them and the edge of the wharves next the river, the ground in front of the docks sloping to the river for the purpose of launching and hauling up vessels; the tide flowing up a greater space than ten feet from the front of the docks. The river, after leaving the town, flows for more than a mile before falling into the sea." [The case then stated that, the Act of Parliament not defining the Haven, the respondents, to prove the place in question to be in the Haven, relied upon the language of several sections of the act, particularly sects. 8, 28, 29, 30, 35, 66, 73, 77, and 93, and gave certain evidence. The case set out this evidence and the evidence upon which the appellant relied, and upon which the Court was to draw the inference whether the place in question was in the Haven, and whether there was a right of passage over the locus in quo].

It was agreed between the parties, and directed by the arbitrator, who had stated the case, (among other things) that all Acts relating to the said Haven, Bridge and piers (a) should form part of the case. And the Court was to be at liberty to draw such inferences from the evidence stated as the Quarter Sessions might have drawn.

(a) The first of the above mentioned Acts which accompanied the case was the 20 G. 2. c. 40., "An Act to revive, continue and amend an Act made in the 9th year of the reign of his late Majesty King George I., intituled 'An Act for clearing, depthening, repairing, extending, maintaining and improving the Haven and Piers of *Great Yarmouth*; and for depthening and making more navigable the several rivers emptying themselves at the said Town;'" &c. The next of the above mentioned Acts was 23 G. 2. c. 6. The title of it was similar to that of 9 G. 1. c. 10. Several other Acts are referred to in the argument and judgments.

The question for the opinion of the Court was, What judgment should be given on the said appeal.

1861.

HARROD
v.
WORSHIP.

Upon the case coming on for argument in *Michaelmas* Term 1860, *November* 14th, the case was referred back to the arbitrator to find whether, at the time of the passing of The *Great Yarmouth* Haven Bridge and Navigation Act, 1835, there was a public right of passage over the locus in quo ; and, he having found in the negative, the case was now argued by

Couch, in support of the conviction. The locus in quo is a space of ground immediately adjoining the Haven of *Great Yarmouth* within the meaning of sect. 76 (a) of

(a) By stat. 5 & 6 W. 4. c. xlix. "An Act for improving the Haven of *Great Yarmouth* in the county of *Norfolk*, and the several rivers connected therewith," &c. it is enacted :

Sect. 76. "That if any person shall set, place or lay on any quay, wharf or landing place within ten feet of the quay head, or on any space of ground immediately adjoining to the said Haven, and within the space of ten feet from high water mark, any goods, materials or articles whatsoever, so as to obstruct the free and commodious passage through or over the same ; or if any person shall break down or remove any quay head or river bank next adjoining such Haven, for the purpose of forming any dock for the hauling up or launching any vessel, or any timber or material, without making and maintaining a footway, bridge or passage over the same, to consist of planks together not less than six feet in width, and guarded by a rail next the river, so as to be a safe and convenient passage for foot passengers along and by the side of the said river banks, every person so offending shall forfeit and pay any sum not exceeding 5*l.* for every such offence."

Sect. 77. "Provided always and be it further enacted, that if any person shall empty or lay any ballast, stones, dust, ashes, manure, filth, earth, or other rubbish into the said Haven, or on any of the piers, wharfs or quays belonging to the said Haven or borough (except in places to be appointed for that purpose), or shall, without the permission or contrary to the direction of the said pier master or harbour master, within their respective limits, place or lay on any public quay, wharf or landing place adjoining to the said Haven, any goods or articles whatsoever, and shall suffer the same to remain on such quay, wharf or landing place for a longer space of time than three days, or shall neglect

1861.
 HARROD
 V.
 WORSHIP.

The *Great Yarmouth* Haven, Bridge, and Navigation Act, 1835, 5 & 6 W. 4. c. xlix. It is not contended that sect. 76 gives a public right of way or passage where none previously existed ; but that section, taken in connection with the previous Act, 39 & 40 G. 3. c. iv., shews that it was intended to reserve a space of ten feet by the side of the river or Haven free from obstruction for the purposes of the Haven and navigation as for towing vessels before steam tugs were introduced. The word " passage " does not necessarily imply a public right of way. Sect. 77 provides for the removal of obstructions on public quays, wharfs and landing places, and therefore sect. 76 must have had a different object, and is not limited to spaces of ground over which there is a right of way ; but is intended to apply to all the land adjoining the Haven. He also referred to sect. 13 of stat. 39 & 40 G. 3. c. iv. (a).

or refuse after the expiration of such three days, and after notice given by the pier master or harbour master, or their respective deputies, to remove any such goods or articles, then and in every such case such person shall forfeit and pay a sum not exceeding 10*l*.; and the pier master or harbour master, or their respective deputies, is and are hereby respectively authorized, upon any neglect or refusal to remove any obstruction as aforesaid, to cause the same to be removed ; and the expence of such removal shall be borne and paid by the owners thereof in the manner hereinbefore directed in cases of removing vessels by the harbour master or pier master, or their respective deputies."

(a) By stat. 39 & 40 G. 3. c. iv., " An Act for continuing, for a further term of twenty-one years, and from thence to the end of the then next session of Parliament, the term of two Acts one made in the twelfth and the other in the twenty-fifth year of the reign of his present Majesty for clearing, deepthening, repairing, maintaining and improving the Haven and Piers of *Great Yarmouth* ; and for deepthening and making more navigable the several rivers emptying themselves into the said Haven ; " &c., it is enacted :

Sect. 13. " That if any person or persons shall throw or empty any ballast, earth, sand, rubbish or stones into the said Haven, or shall lay any ballast, earth, sand, rubbish or stones on the west side of the said Haven, within ten feet of the quay head or river bank, for any purpose whatsoever (save

Buhoer, for the appellant. The locus in quo is private property, and not subject to the operation of sect. 76 of stat. 5 & 6 *W.* 4. c. xlix. He cited *Stracey v. Nelson(a)*. [*Wightman J.* referred to sect. 18 of stat. 12 & 13 *Vict. c.* xlvi. (b).]

1861.

HARROD
v.
WORSHIP.

COCKBURN C. J. I am of opinion that the conviction cannot be sustained. I adhere to the opinion which we intimated when the case was before us in last *Michaelmas* Term, namely, that sect. 76 of stat. 5 & 6 *W.* 4. c. xlix. does not create any right of passage where none existed at the time of the passing of the Act. The offence of which the appellant has been convicted is that of placing materials within ten feet of the Haven of *Great Yarmouth*, so as to obstruct the free and commodious passage through and over the same. In fact there was not, at the time of the passing of the Act, any right of passage for the public over it: therefore, unless the Act created the right, the appellant could not be convicted of an obstruction of it within sect. 76.

and except for the purpose of making or repairing any quays or banks, and during such time only as such quays or banks shall be making or repairing), and shall suffer the same to lie there for the space of twenty-four hours, every such person and persons shall, for every such offence, forfeit and pay any sum not exceeding 5*l.*, nor less than 40*s.*"

(a) 12 *M. & W.* 535.

(b) By stat. 12 & 13 *Vict. c.* xlvi. "An Act for the improvement of the Haven, Bridge, and navigation of *Great Yarmouth*, in the county of *Norfolk*," it is enacted:

Sect. 18. "That the said Commissioners of this Act are hereby authorized and required, twice at least in every year, to inspect or cause to be inspected, the public right or rights of way in and along both shores of the Haven, and report to the said Lord High Admiral, or the said Commissioners for executing the office of Lord High Admiral, every encroachment made on such right or rights of way; and the Commissioners of this Act shall and they are hereby required to take all necessary proceedings to abate or remove every such encroachment."

1861.
 HARROD
 v.
 WORSHIP.

It is argued that the effect of sect. 76 is to give a right of passage over the space in question for using the Haven ; and that sect. 18 of stat. 12 & 13 *Vict. c. xlviii.*, by which the Commissioners of the Act are authorized and required to inspect the public rights of way in and along the shores of the Haven, and are required to take proceedings to abate or remove encroachments on such rights, confirms that construction. But it is a canon of construction of Acts of Parliament that the rights of individuals are not interfered with unless there is an express enactment to that effect, and compensation is given to them. And it would militate against that canon, and seriously interfere with private rights, if we held that the enactment in sect. 76 carried into it, by implication, a right by the public to pass over the space in question. I think the legislature meant that both sect. 76 of stat. 5 & 6 *W. 4. c. xlix.* and sect. 18 of stat. 12 & 13 *Vict. c. xlviii.* should be applied to those places where a public right of way already existed, and not where, previously, there was no right of way. The effect of not so limiting the application of those enactments would be that, whereas there are many private grounds along the shore of the Haven, a right would be given by implication to the public to interfere with and remove private walls and pass over private property ; which could not be intended without compensation. Therefore, I am of opinion that sect. 76 of stat. 5 & 6 *W. 4. c. xlix.* must be limited to the cases in which a right of passage has been enjoyed by the public.

WIGHTMAN J. I regret that I cannot come to the same conclusion. It seems to me that the words of the 76th section of stat. 5 & 6 *W. 4. c. xlix.* are too strong

1861.

HARROD
V.
WORSHIP.

to admit of the construction which my Lord has put upon them, in which I believe he will be followed by the rest of the Court. [His Lordship read the section.] The section says nothing about obstructing a right of way ; but it prohibits, under the penalty of 5*l*, any person placing any goods, materials or articles whatsoever upon the ground immediately adjoining the Haven "so as to obstruct the free and commodious passage through or over the same." Whoever may have a right to go over the adjoining land, and for whatever purpose, and however that right may arise, is to have a free passage by the terms of the section, which provides that a clear space of ten feet is to be left. The words are very strong, and it is, I think, very difficult to get over them. I admit that there may be a difficulty as to their conferring upon the public a right of way over the land, and I do not know to what extent such a right may be given, or whether it is given at all ; nor do I know that there was any reason for the enactment, except that, for the general purposes of the Haven, it was considered expedient to keep a space clear at the side of it ; but the obstruction is prohibited in express terms. The latter part of the section seems not to be unimportant ; it imposes an equal penalty on any person who shall make a cut in his land adjoining the Haven, without leaving a bridge of the width expressed "so as to be a safe and convenient passage for foot passengers." It may be that the Legislature considered that it was important that a free passage should be maintained all round the Haven, and that any infringement of private rights in lands &c. adjoining the Haven would be compensated to them by the benefits they, as well as the public, would derive from the improvement of the Haven. Former Acts for repairing, im-

1861.

HARROD
v.
WORSHIP.

proving and maintaining the Haven, the 20 *G. 2. c. 40.* and 23 *G. 2. c. 6.*, contain a recital of the importance of the borough of *Great Yarmouth* and its Haven : the preamble of the latter states its object to be "for preserving to the inhabitants of the said borough, and of the adjacent counties, the benefit of the said Haven and piers ; and to the end that the said Haven, which is of so great importance to the trade of these kingdoms in general, may be cleared and deepened, and the said piers repaired, extended, altered, improved and maintained;" &c. Several Acts, in furtherance of this object, follow ; and then, by the 18th section of stat. 12 & 13 *Vict. c. xlviii.*, the Commissioners of the Act are authorized and required to inspect "the public right or rights of way in and along both shores of the Haven, and report to the Lord High Admiral * * * every encroachment made on such right or rights of way." And they are required "to take all necessary proceedings to abate or remove every such encroachment." This seems to suppose that there are rights of way along both sides of the Haven. Looking at the express terms and apparent intention of the Acts, I find it difficult to come to any other conclusion than that a person who places materials within the prohibited space forfeits the penalty in section 18 ; and therefore that the appellant was properly convicted.

CROMPTON J. My mind has fluctuated during the argument. At one time I thought that the prohibition in sect. 76 of stat. 5 & 6 *W. 4. c. xlix.* extended to the case of an owner of property adjoining the Haven ; but, on full consideration, I think that the better construction is that contended for by Mr. *Bulwer*. The other construction is an interference with private rights without any compensation to individual owners ; and

we ought to see clearly that such was the intention of the Legislature before we adopt that construction. I cannot see that the statute gives a public right of passage of ten feet width all round the Haven. The nature of the property on the side of the Haven is such that, in some parts, yards and buildings come down to the water ; and it would be a harsh construction of the enactment to say that ten feet adjoining the Haven are taken from the owners and given to the public without compensation to the owners. The construction contended for by Mr. *Bulwer* makes the Legislature say : "Whereas there are existing rights of way on the side of the Haven, we will take care that they are protected, and that an obstruction of them shall be removed." The words are, if any person shall place any articles "so as to obstruct the free and commodious passage through or over the same," which must be construed "lawful passage," that is, a passage which exists over the same. In this particular spot there would be no obstruction of such a passage, because it is hardly contended that a right of way is given by sect. 76. So, also, as to footways in the latter part of the section. I think the owner is to make and maintain a bridge over the cut which he has made into the Haven only where there is a right of way. The same observation applies to sect. 18 of stat. 12 & 13 *Vict. c. xlviii.* It is not said that there is one line of way all round the harbour ; but the section takes for granted that there are rights of way along both shores of the Haven, though perhaps not continuous, and enacts that those rights are not to be interfered with. I am of opinion that this conviction ought to be quashed ; but of course our judgment will not affect other parts of the harbour where a public right of passage exists.

1861.

HARROD
V.
WORSHIP.

1861.

HARROD
v.
WORSHIP.

BLACKBURN J. I am of opinion that, on the true construction of sect. 76 of stat. 5 & 6 W. 4. c. xlix., the appellant ought not to have been convicted. It is important that there should be rights of passage along the sides of this ancient Haven, and it is very likely that there should be, though not on every part. Taking sect. 76 by itself, the first part of it must be construed by the respondents either as declaring that there is and shall be a free and commodious passage all round the Haven, that is, giving the right and imposing a penalty for obstructing it, according to which construction the section takes away a private right without giving compensation ; or, if it does not give a free and commodious passage, it must be construed as enacting that the space is to be kept open though no person could use it, and though there was no right of way at the time of the passing of the Act. So, also, as to the second part of the section, which subjects to a penalty any person who forms a dock on the side of the Haven without making and maintaining a footway bridge over it, we cannot suppose that the Legislature would order a safe foot bridge to be made and maintained unless foot passengers had a right to go there ; and, if they had it not, the respondents must contend that the Legislature gave it. But I agree with the Lord Chief Justice and my brother *Crompton* that we should not construe that section so as to interfere with private rights. The words of that section, if literally read, bear the construction put upon them by my brother *Wightman*, but that would subject a person to a penalty for doing an act upon his own land. I think we must construe the section as imposing a penalty for doing an act of obstruction at those places where a public right exists. Sect. 18 of

stat. 12 & 13 *Vict. c. xlviii.* only supposes that there are public rights of way along parts of both sides of the Haven, and directs the Commissioners to look after them and enforce them.

1861.

HARROD
v.
WORSHIP.

Conviction quashed.

TWEDDLE *against* ATKINSON, Executor of
GUY, deceased.

Friday,
June 7th.

Declaration stated that, in consideration of an intended marriage between the plaintiff and the daughter of *W. G.*, *W. T.*, the father of the plaintiff, and *W. G.* verbally promised to give their children marriage portions; and that after the marriage *W. G.* and *W. T.*, as a mode of giving effect to their said verbal promises, entered into a written agreement, by which it was mutually agreed that they should pay the sums of 200*l.* and 100*l.* respectively to the plaintiff, and that the plaintiff should have full power to sue for the same in any Court of law or equity. Breach: non-payment of the 200*l.* by *W. G.*, or by the defendant, his executor: Held, on demurrer, that the action was not maintainable, notwithstanding the near relationship of the plaintiff to the party from whom the consideration moved.

Agreement.
Consideration.
Near relationship.
Action.

THE declaration stated that the plaintiff was the son of *John Tweddle*, deceased, and before the making of the agreement hereafter mentioned, married the daughter of *William Guy*, deceased; and before the said marriage of the plaintiff the said *William Guy*, in consideration of the then intended marriage, promised the plaintiff to give to his said daughter a marriage portion, but the said promise was verbal, and at the time of the making of the said agreement had not been performed; and before the said marriage the said *John Tweddle*, in consideration of the said intended marriage, also verbally promised to give the plaintiff a marriage portion, which promise at the time of the making of the said agreement had not been performed. It then alleged that after the marriage and

1861.

 TWEDDLE
 V.
 ATKINSON.

in the lifetime of the said *William Guy*, and of the said *John Tweddle*, they, the said *William Guy* and *John Tweddle*, entering into the agreement hereafter mentioned as a mode of giving effect to their said verbal promises; and the said *William Guy* also entering into the said agreement in order to provide for his said daughter a marriage portion, and to procure a further provision to be made by the said *John Tweddle*, by means of the said agreement, for his said daughter, and acting for the benefit of his said daughter; and the said *John Tweddle* also entering into the said agreement in order to provide for the plaintiff a marriage portion, and to procure a further provision to be made by the said *William Guy*, by means of the said agreement, for the plaintiff, and acting for the benefit of the plaintiff; they the said *William Guy* and *John Tweddle* made and entered into an agreement in writing in the words following, that is to say:

“*High Coniscliffe, July 11th, 1855.*

“Memorandum of an agreement made this day between *William Guy*, of &c., of the one part, and *John Tweddle*, of &c., of the other part. Whereas it is mutually agreed that the said *William Guy* shall and will pay the sum of 200*l.* to *William Tweddle*, his son-in-law; and the said *John Tweddle*, father to the aforesaid *William Tweddle*, shall and will pay the sum of 100*l.* to the said *William Tweddle*, each and severally the said sums on or before the 21st day of *August, 1855*. And it is hereby further agreed by the aforesaid *William Guy* and the said *John Tweddle* that the said *William Tweddle* has full power to sue the said parties in any Court of law or equity for the aforesaid sums hereby promised and specified.”

"And the plaintiff says that afterwards and before this suit, he and his said wife, who is still living, ratified and assented to the said agreement, and that he is the *William Tweddle* therein mentioned. And the plaintiff says that the said 21st day of *August*, A.D. 1855, elapsed, and all things have been done and happened necessary to entitle the plaintiff to have the said sum of 200*l.* paid by the said *William Guy* or his executor: yet neither the said *William Guy* nor his executor has paid the same, and the same is in arrear and unpaid, contrary to the said agreement."

1861.

TWEDDLE
v.
ATKINSON.

Demurrer and joinder therein.

Edward James, for the defendant.—The plaintiff is a stranger to the agreement and to the consideration as stated in the declaration, and therefore cannot sue upon the contract. It is now settled that an action for breach of contract must be brought by the person from whom the consideration moved; *Price v. Easton* (a). (He was then stopped.)

Mellish, for the plaintiff.—Admitting the general rule as stated by the other side, there is an exception in the case of contracts made by parents for the purpose of providing for their children. In *Dutton and Wife v. Poole* (b), affirmed in the Exchequer Chamber, a tenant in fee simple being about to cut down timber to raise a portion for his daughter, the defendant his heir-at-law, in consideration of his forbearing to fell it, promised the father to pay a sum of money to the

(a) 4 B. & Ad. 433.

(b) 2 Lev. 210; 1 Vent. 318. Affirmed on error in the Exch. Ch., *T. Raym.* 302.

1861.

 TWEDDLE
 v.
 ATKINSON.

daughter, and an action of assumpsit by the daughter and her husband was held to be well brought. [*Wightman J.* In that case the promise was made before marriage. In this case the promise is post nuptial, and the whole consideration on both sides is between the two fathers.] The natural relationship between the father and the son constituted the father an agent for the son, in whose behalf and for whose benefit the contract was made, and therefore the latter may maintain an action upon it. [*Crompton J.* Is the son so far a party to the contract that he may be sued as well as sue upon it? Where a consideration is required there must be mutuality. *Wightman J.* This contract, so far as the son is concerned, is one sided.] The object of the contract, which was that the children should be provided for, will be accomplished if this action is maintainable: whereas if the right of action remains in the father it will be defeated, because the damages recovered in that action will be his assets. [*Crompton J.* Your argument will lead to this, that the son might bring an action against the father on the ground of natural love and affection.] In *Bourne v. Mason* (a) two cases are cited which support this action. In *Sprat v. Agar*, in the King's Bench in 1658, one promised the father that, in consideration that he would give his daughter in marriage with his son, he would settle so much land; after the marriage the son brought an action, and it was held maintainable. The other was the case of a promise to a physician that if he did such a cure he would give such a sum of money to himself and another to his daughter, and it was resolved the daughter might bring assumpsit, "Which cases," says the report, "the Court agreed;"

(a) 1 *Ventr.* 6.

and the reason assigned as to the latter is, "the nearness of the relation gives the daughter the benefit of the consideration performed by her father." There is no modern case in which this question has been raised upon a contract between two fathers for the benefit of their children.

1861.

TWEDDLE
v.
ATKINSON.

[*Wightman J.* If the father of the plaintiff had paid the 100*l.* which he promised, might not he have sued the father of the plaintiff's wife on his express promise? According to the old cases he could not. When a father makes a contract for the benefit of his child, the law vests the contract in the child. In *Thomas v. ———* (a) the defendant promised to a father that in consideration that he would surrender a copyhold to the defendant, the defendant would give unto his two daughters 20*l.* a-piece; and after verdict in an action upon the case brought by one of the daughters for breach of that promise, on motion for arresting the judgment on the ground that the two ought to have joined, it was held that the parties had distinct interests, and so each might bring an action.

Edward James was not called upon to reply.

WIGHTMAN J. Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. The strongest of those cases is that cited in *Bourne v. Mason* (b), in which it was held that the daughter of a physician might maintain assumpsit upon a promise to her father to give her

(a) *Sty.* 461.(b) 1 *Ventr.* 6.

1861. a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit.

TWEDDLE
v.
ATKINSON.

CROMPTON J. It is admitted that the plaintiff cannot succeed unless this case is an exception to the modern and well established doctrine of the action of assumpsit. At the time when the cases which have been cited were decided the action of assumpsit was treated as an action of trespass upon the case, and therefore in the nature of a tort ; and the law was not settled, as it now is, that natural love and affection is not a sufficient consideration for a promise upon which an action may be maintained ; nor was it settled that the promisee cannot bring an action unless the consideration for the promise moved from him. The modern cases have, in effect, overruled the old decisions ; they shew that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued. It is said that the father in the present case was agent for the son in making the contract, but that argument ought also to make the son liable upon it. I am prepared to overrule the old decisions, and to hold that, by reason of the principles which now govern the action of assumpsit, the present action is not maintainable.

BLACKBURN J. The earlier part of the declaration shews a contract which might be sued on, except for the enact-

XXIV. VICTORIA.

ment in sect. 4 of the Statute of Frauds, 29 *Car.* 2. *c.*

The declaration then sets out a new contract, and the only point is whether, that contract being for the benefit of the children, they can sue upon it. Mr. *Mellish* admits that in general no action can be maintained upon a promise, unless the consideration moves from the party to whom it is made. But he says that there is an exception; namely, that when the consideration moves from a father, and the contract is for the benefit of his son, the natural love and affection between the father and son gives the son the right to sue as if the consideration had proceeded from himself. And *Dutton and Wife v. Poole* (a) was cited for this. We cannot overrule a decision of the Exchequer Chamber; but there is a distinct ground on which that case cannot be supported. The cases upon stat. 27 *El.* c. 4., which have decided that, by sect. 2, voluntary gifts by settlement after marriage are void against subsequent purchasers for value, and are not saved by sect. 4, shew that natural love and affection are not a sufficient consideration whereon an action of assumpsit may be founded.

Judgment for the defendant.

(a) 2 *Lev.* 210; 1 *Ventr.* 318. Affirmed on error in the Exch. Ch., *T. Raym.* 302.

1861.

Tuesday,
June 11th.

In re MANSERGH.

*Jurisdiction
of Queen's
Bench over
tribunals
abroad.
Court martial.
Military
status.*

1. This Court has no jurisdiction over tribunals out of the realm of *England*, although in countries subject to the *British Crown*.

2. Where the *civil* rights of a person in military service are affected by the judgment of a military tribunal, in which that tribunal has acted without jurisdiction, or has exceeded its jurisdiction, this Court will interfere; aliter where nothing but the *military* status of the party is affected by the judgment.

3. A Captain in the Queen's service, when stationed with his regiment in *India*, was gazetted to a majority; and the appointment was notified in the general orders of the Commander-in-chief in *India* at head quarters, and in the regimental orders. Subsequently, the Captain having written to the Colonel of that regiment an insubordinate letter, was tried by court martial in *India*, was dismissed the service, and the proceedings of the court martial transmitted to the Judge Advocate General in *London*: three years afterwards, application being made to this Court for a certiorari to bring up the judgment of the court martial, in order that it might be quashed, the Court refused to interfere.

THIS was an application for a rule calling on the Judge Advocate General to shew cause why a certiorari should not issue to bring up, in order that it might be quashed, the record of the conviction of *J. C. Mansergh*, formerly a Captain and Brevet Major in Her Majesty's 6th Regiment of Infantry, and late a Major in Her Majesty's 15th Regiment.

It appeared from the affidavits that, in *January*, 1858, the applicant was on duty with his regiment, Her Majesty's 6th Foot, then stationed at *Calcutta*, the regiment being under the command of Colonel *Barnes*, and Lord *Clyde* (then Sir *Colin Campbell*) being commander-in-chief in *India*. On the 19th *February*, 1858, Captain *Mansergh* was gazetted to a majority in the 15th Foot, at that time stationed in *England*. Notice of this appointment was transmitted to *India*, and noti-

fied by the Commander-in-chief in the general orders at head quarters, and also in the regimental orders of the 6th Foot ; after which notification, according to the customs and regulations of the army, the applicant ceased to belong to that regiment. The regiment was about to start on active service, when Colonel *Barnes* informed Captain *Mansergh* of his promotion, and desired him to give up his company to another officer, which he did accordingly. Subsequently, Major *Mansergh*, conceiving that the notification of his appointment to the 15th Foot had been obtained by Colonel *Barnes* for the purpose of excluding him from the service on which the regiment was ordered, wrote, on the 27th *April*, a letter to the Colonel expressing that view in strong language. For this he was arrested upon a charge preferred against him by Colonel *Barnes* ; and, in *August*, was tried by court martial at *Calcutta*, on that charge : namely of having addressed the above letter to Colonel *Barnes*, which was described as containing highly offensive and insulting language to him, his superior officer ; such conduct being grossly insubordinate, highly unbecoming a commissioned officer, and subversive of military discipline. Major *Mansergh* was found guilty, and sentenced to be dismissed the army, which sentence was confirmed by Lord *Clyde* : and the proceedings of the court martial were sent to *England* and deposited with the Judge Advocate General.

1861.

 In re
 MANSERGH.

Lush, in support of the application.—The court martial had no jurisdiction to try Major *Mansergh* on the charges brought against him. This question depends on the Mutiny Act in force at the time, i. e. 20 *Vict.* c. 13. Sect. 6 enacts, "For the purpose of

1861.

 In re
 MANSERGH.

bringing offenders against this Act and against the articles of war to justice, Her Majesty may from time to time, in like manner as has been heretofore used, grant commissions under the Royal Sign Manual for the holding of courts martial within the United Kingdom of *Great Britain and Ireland*, and may grant commissions or warrants under the said Royal Sign Manual to the chief governor or governors of *Ireland*, the commander of the forces, or the person or persons commanding in chief, or commanding for the time being, any body of Her Majesty's forces, as well within the United Kingdom of *Great Britain and Ireland* and the *British* isles, as in any of Her Majesty's garrisons and dominions or elsewhere beyond seas, for convening courts martial, and for authorizing any officer under their respective commands to convene courts martial, as occasion may require, for the trial of offences committed by any of the forces under the command of any such last mentioned officer, whether the same shall have been committed before or after such officer shall have taken upon him such command * * * *; and any person subject to this Act, who shall, in any part of Her Majesty's dominions or elsewhere, commit any of the offences for which he may be liable to be tried by court martial by virtue of this Act or of the articles of war, may be tried and punished for the same in any part of Her Majesty's dominions or any other place whereto he may have come or where he may be after the commission of the offence, as if the offence had been committed where such trial shall take place."

Sect. 7. "A general court martial convened in *St. Helena* &c., shall consist of not less than five commissioned officers; if convened in *Jamaica* &c., or in any

place out of the Queen's dominions, excepting the *Ionian Islands* and the places hereinbefore mentioned, it shall consist of not less than seven, and if convened in any other part of the Queen's dominions, or in the *Ionian Islands* or in the settlements of the *East India* Company, it shall consist of not less than thirteen commissioned officers;" &c.

1861.

In re
MANSEERGH.

Sect. 17. "Every Judge Advocate or person officiating as such at a general court martial, and the president of every district or garrison court martial, where the offender shall be a non-commissioned officer or soldier belonging to Her Majesty's land forces, are required to transmit, with as much expedition as may be, the original proceedings and sentence thereof to the Judge Advocate General in *London*, in whose office they shall be carefully preserved; and any person tried by a general court martial, or any person on his behalf, shall be entitled, on demand, to a copy of such proceedings and sentence, (paying &c.), whether such sentence shall be approved or not, at any time not sooner &c.; provided that such demand as aforesaid shall have been made within the space of three years from the date of the approval or other final decision upon the proceedings before such general court martial."

When Major *Mansergh* wrote the letter, for writing which he was sentenced by the court martial, he was not in the *Indian* service at all, but belonged to the 15th Regiment of Foot in *England*: consequently the chief of the *Indian* army had no authority over him. [*Blackburn J.* The second section of the statute enacts: "All the provisions of this Act shall apply to all persons who are or shall be commissioned or in pay as an officer, or who are or shall be listed or in pay as a non-commis-

1861.

 In re
 MANSERGH.

sioned officer or soldier * * * *, and to persons in the war department, who are or shall be serving with any part of Her Majesty's forces at home or abroad, under the command of any officer having commission from her Majesty" &c. It would seem, therefore, that, although he had given up his regiment, Major *Mansergh* still belonged to the Queen's army, and was subject to its martial discipline. If so, would he not be under the Commander-in-chief in *India*? *Cockburn C. J.* Suppose the court martial wrong in what they did, what jurisdiction have we?] This Court has a general controlling jurisdiction over all inferior tribunals by means of the prerogative writs of certiorari, prohibition &c.; *Rex v. Cowle (a)*, *Rex v. Moreley (b)*: the latter of which, however, would not lie in this case, seeing that the proceedings are at an end. In *Rex v. Cowle (a)* it was held that a certiorari might go to *Berwick-upon-Tweed*; and Lord *Mansfield* says (pp. 855-6): "Writs of mandamus, prohibition, habeas corpus and certiorari, upon a proper case, may issue to every dominion of the Crown of *England*." [*Cockburn C. J.* That must be taken with considerable qualification. Those terms are very general.] In *Grant v. Gould (c)*, Lord *Loughborough C. J.*, in delivering the judgment of the Court, says, (p. 100), speaking of a court martial under the Mutiny Acts: "This Court being established in this country by positive law, the proceedings of it, and the relation in which it will stand to the Courts of *Westminster Hall*, must depend upon the same rules, with all other Courts, which are instituted, and have particular powers given them, and whose acts therefore, may become the subject of application

(a) 2 *Burr.* 834.(b) 2 *Burr.* 1040.(c) 2 *H. Bl.* 69.

to the Courts of *Westminster Hall*, for a prohibition. Naval Courts Martial, Military Courts Martial, Courts of Admiralty, Courts of Prize are all liable to the controlling authority, which the Courts of *Westminster Hall* have from time to time exercised, for the purpose of preventing them from exceeding the jurisdiction given to them: the general ground of prohibition, being an excess of jurisdiction, when they assume a power to act in matters not within their cognizance." [*Wightman J.* There the party was not a soldier at all.] In *The Matter of Poe (a)*, indeed, the Court refused a prohibition to a court martial after its sentence had been ratified by the King and carried into execution: but that decision proceeded on the merits of the particular case. [*Cockburn C. J.* If a court martial were to assume jurisdiction over a man who was not subject to military discipline at all, this Court would interfere. But I very much doubt if it could interfere because a military man was tried by one court martial instead of another. Moreover, the sentence of this court martial does not touch the civil rights, and only affects the military status of the applicant. Does not every person who enters the military service of the Crown give the Crown a right to determine his military status at pleasure? *Blackburn J.* In *Lieutenant Allen's Case (b)* we issued a habeas corpus where the party was unlawfully imprisoned by military authority.] Yes, when the court martial is held in a district which is under martial law, or in a state of siege. A man's civil rights are greatly injured by any improper judgment against him. [*Wightman J.* Can we issue a certiorari to bring up the proceedings of a court abroad?] A habeas corpus has been

1861.

 In re
 MANSERGH.

(a) 5 B. & Ad. 681.

(b) 7 Jur. N. S. 234.

1861. issued to *Canada*; *In re Anderson* (a): and a habeas corpus or certiorari will go to *St. Helena*; *Ex parte Lees* (b). Besides, the certiorari here would not be directed to the court martial, but to the Judge Advocate General, to bring up a document which is now a record in *England*. *Reg. v. Bolton* (c), and many subsequent cases, establish that want of jurisdiction may always be shewn by affidavit. [*Crompton J.* The Judge Advocate General is the mere keeper of the proceedings. Besides, even if we thought the court martial wrong, we ought not, in the exercise of our discretion, to interfere with proceedings that took place three years ago.]

IN RE
MARSHALL.

COCKBURN C. J. The result of the discussion which has taken place on the present application is that I, for my part, entertain no doubt that we ought not to interfere. I say "discussion;" for, although only one side has been heard, we have all expressed our opinions during the argument of Mr. *Lush*, in order to elicit from him whatever could be said on the matter, which is one of considerable importance, and on which no one is better capable of throwing light than himself.

I quite agree that where the *civil* rights of a person in military service are affected by the judgment of a military tribunal, in pronouncing which the tribunal has either acted without jurisdiction or has exceeded its jurisdiction, this Court ought to interfere to protect those civil rights: e. g. where the rights of life, liberty or property are involved, although I do not know whether the latter case could occur. Here, however, there was nothing of the sort, and the only matter involved was

(a) 7 *Jur. N. S.* 122.

(b) *E. B. & E.* 828; 5 *Jur. N. S.* 333.

(c) 1 *Q. B.* 66.

the *military* status of the applicant—a thing which depends entirely on the Crown, seeing that every person who enters into military service engages to be entirely at the will and pleasure of the Sovereign.

1861.

In re
MANSEKH.

Then there is the additional fact that these proceedings originated abroad, in a place the tribunals of which are not subject to our jurisdiction. Mr. *Lush*, indeed, contends that because the record of the proceedings is in this country we have jurisdiction over it. Assuming that for a moment, yet when we look at the particular nature of the case before us, we see that the military status of the applicant alone is affected, and consequently, if he had just cause of exception to the act of the tribunal by which he was sentenced, he might have appealed to the Queen to reconsider the matter with the advice of her Judge Advocate.

For these reasons I am of opinion that in this case we have no jurisdiction to grant a certiorari; besides which, certiorari being a discretionary writ, we most certainly ought not, in the exercise of our discretion, to grant it if we had the jurisdiction.

WIGHTMAN J. I am entirely of the same opinion. If we grant this certiorari, it must be with the view to ultimate proceedings being taken to quash it. Now, independent of the objection that we have no power to interfere by certiorari with a court in *India*, I agree with my Lord Chief Justice that whatever might be the case if the civil rights of this party were affected, nothing was affected in the present instance beyond his military status. It appears that, three years ago, a court martial took place, the proceedings of which have been approved by authority, and, in virtue of its sentence,

1861.

 In re
 MANSERGH.

the applicant was dismissed from the Queen's service. I think the observations of the Court in *The M. of Poe* (a) are entitled to much consideration. "If a writ were to issue at all, we see no Court or individual to whom it could be addressed other than the applicant himself, who, acting on the sentence, has been placed in a position to dismiss the officer from his service. Now, admitting for a moment that it were possible to address any writ directly to his Majesty, when it is considered that the power is undoubtedly inherent in the Crown, and that it has been lawfully executed even without any Court-martial, it will at once appear manifest that no prohibition can lie in such a case. For what the King has the power to do, independently of any inquiry, he may do, though the inquiry should not be satisfied as to a Court of law, or even though the Court which conducted it had no legal jurisdiction to inquire." Nothing but the military status of the applicant is affected by the decision of the court-martial, and therefore, in the exercise of our discretion, we ought not to grant this writ.

CROMPTON J. I quite admit that, where there is a clear case for the exercise of our discretion, we ought not to fetter our hands too tightly in its exercise. But then I think the application for our interference ought to be made within a reasonable time.

I, however, dismiss these considerations on the present occasion; for I think that here we have no power at all to interfere. It is argued that because the jurisdiction of this court-martial is in *England* we can do so, but to my mind that makes no difference. We can

(a) 5 B. & Ad. 681. 688.

grant a certiorari unless we see for what purpose the record is sought to be brought before us; and here the object is only to quash it, i. e. if it should appear that the Court abroad has exceeded its jurisdiction, and the question is the same as if a certiorari had been asked for while the proceedings of the court martial in *India* were going on. The question therefore is, have we a discretion, or, if we have, ought we to exercise it, to send a certiorari in every case to colonies, however distant, when tribunals there are supposed to have exceeded their jurisdiction? If so, it would come to this, that we might issue a certiorari to the Privy Council to bring before us the record of any tribunal abroad which had been transmitted to them. No precedent has been suggested for any such proceeding; and it does not appear that this Court ever sent a certiorari beyond seas. The case is said to be analogous to that of habeas corpus, and this, perhaps, is the strongest argument in support of the present application. When a person is improperly imprisoned, as in *Lieutenant Allen's Case* (a), we have a right to inquire into the cause of the imprisonment; but I am far from saying that a habeas corpus would go in such a case as the present. In *Re Anderson* (b), which has been referred to, application was made for a habeas corpus to *Canada*, and precedents were adduced so expressly in point that, according to the great principle regulating these prerogative writs, the party had a *prima facie* right to have the writ issued. Besides, if a habeas corpus is improperly issued, it may be questioned on the return to the writ. We did not grant a rule to shew cause in that case, because there was immediate danger to the party. For these reasons

1861.

 In re
 MANSERGH.

(a) 7 Jur. N. S. 234.

(b) 7 Jur. N. S. 122.

1861.
 In re
 MANSBERGH.

that case must not be taken as an authority that a habeas corpus will go to a colony. The only other case mentioned was the *St. Helena Case, Ex parte Lees* (a); but there, after the Court had refused to interfere, a writ of error had been allowed by the Crown, and the habeas corpus was afterwards issued by a Judge at Chambers merely as an ancillary step (b).

I therefore think that we have no jurisdiction in this case, or at least that, if we have, we ought not, in our discretion, to exercise it.

It is part of our duty to control inferior Courts in this country, but I have yet to learn that that doctrine is applicable to Courts in the colonies.

BLACKBURN J. I am of the same opinion. The object of the certiorari moved for is to quash the proceedings of the court martial. Now, although the actual paper recording the judgment of the court martial is in this country, still the question is, have we power to act in this case, and ought we to exercise it if we have?

I am not satisfied that this court martial had not complete jurisdiction. The applicant was in the Queen's forces, subject to the Mutiny Act. He was attached to the army in *India*, and so long as he was there, he was within the jurisdiction of the Commander-in-chief in *India*, and subject to martial law there; and even supposing he was not, still he was subject to martial law generally. I do not, however, rest my judgment on this.

Assuming that this particular court martial had no

(a) *E. B. & E.* 828; 5 *Jur. N. S.* 333.

(b) See the note to *Ex parte Lees*, 5 *Jur. N. S.* 335, and the observations of Crompton J. in *Anderson's Case*, 7 *Jur. N. S.* 123.

jurisdiction over the applicant, then comes the question, can this Court quash the proceedings of a Court held in *India*? No more I think than they could quash the proceedings of a Court in *France*. The Court of Queen's Bench in *England* controls local tribunals within *England*, and such of its dependencies as are integral parts of *England*, e. g., *Berwick-upon-Tweed*, &c., and probably the *Isle of Man*. But there is no authority that it will send a prohibition or a certiorari to the colonies or to *India*; and before we exercise such a power to control tribunals in those places which are supposed to exceed their jurisdiction, we should clearly see our own jurisdiction.

1861.

 In re
MANSEGH.

I have said there is no authority for such a proceeding as this. The nearest is *In re Anderson* (a), where a habeas corpus was sent to *Canada*. But in that case the writ was granted because it was necessary to act immediately, and it could be afterwards quashed if erroneous, added to which there were some very strong precedents in favour of granting it. But that cannot be taken as a decision of this Court that we have a control over all jurisdictions beyond seas in countries subject to the *British Crown*.

I therefore entertain exceeding doubt if we could grant this certiorari under any circumstances whatever. But if we could, then comes the question of discretion; and, looking at the length of time which has elapsed, and the futility of the proceeding, I think this is not a case in which we ought to exercise our discretion to grant the writ.

Rule refused.

(a) 7 *Jur. N. S.* 122.

— 1572 — 1577

GOVERNMENT OF CANADA

— 310 —

[illegible]

The Local Government Act, 1858" (21 & 22 *Vict. c. 98.*), at the instance of *Edmund Smith*, "upon the ground that it was ultra vires of the said Secretary of State to make the said order."

1861.

 Ex parte
SMITH.

The order was as follows :—

"Whereas by The Local Government Act, 1858, it is enacted that any place not having a known or defined boundary may petition one of Her Majesty's principal Secretaries of State to settle its boundaries for the purposes of the said Act. And whereas a petition has been presented to me, as one of Her Majesty's Principal Secretaries of State as aforesaid, from inhabitant ratepayers of portions of the townships of *Todmorden* and *Walsden*, in the county of *Lancaster*, and of portions of the townships of *Langfield* and *Stansfield*, in the county of *York*, praying me to settle and fix, for the purposes of the hereinbefore recited Act, the boundaries of a District to be called 'The *Todmorden* District,' and to include portions of the aforesaid townships of *Todmorden* and *Walsden*, *Langfield* and *Stansfield*. And whereas the said petition was duly signed by not less than one-tenth of the ratepayers resident within the said portions of such townships, and likewise set forth the boundaries of the District proposed to be fixed for the purposes of the said Act, as required by the provisions of such Act. And whereas, upon the receipt of the said petition, I directed inquiry to be made, under the provisions of the said Act, as to the genuineness of such petition, and as to the propriety of the proposed boundaries, and such inquiry has been duly made by *William Ranger*, Esq., the inspector appointed for such purpose, and he has now reported thereon to me.

Now, therefore, I, as one of Her Majesty's Principal

1861.

Ex parte
SMITH.

Secretaries of State as aforesaid, having taken the matters contained in such petition into consideration, do hereby, in pursuance of the powers vested in me by The Local Government Act, 1858, make order as follows.

"1. That from and after the date of the present order the boundaries hereinafter set forth and described shall form and constitute the boundaries of the District of *Todmorden* for the purposes of The Local Government Act, 1858 ; and that the parts included within such boundaries shall henceforth, for the purposes of such Act, be deemed to be a place with a known and defined boundary, and may adopt the said Act accordingly." [The boundaries were then set forth.]

"2. That *James Stansfield*, Esq., solicitor, of *Todmorden*, be the summoning officer, and take all such steps as may be necessary, under the hereinbefore recited Act, for convening a meeting of the ratepayers of the aforesaid District to decide as to the adoption of The Local Government Act, 1858, within the boundaries of such District as settled by this order. Given under my hand this 15th day of *January* 1861.

"*Home Office, Whitehall.*"

"*G. C. Lewis.*"

It appeared from the affidavits that "the District of *Todmorden*" was a place not having a known or defined boundary within sect. 16 of The Local Government Act, 1858, 21 & 22 *Vict. c. 98.* ; and that, in pursuance of that section, a petition, signed by one tenth-part of the ratepayers resident within the boundaries proposed in the petition, describing it as a place not having any known or defined boundary, had been presented to the Secretary of State for the Home Department, praying him to settle its boundary for the purposes of The Local Government Act, 1858. In compliance with that petition the

Secretary of State directed inquiry to be made, by an inspector appointed for the purpose, as to the propriety of the boundaries proposed in the petition. The inspector reported to the Secretary of State in favour of the proposed boundaries, subject to certain alterations, by which various properties situate within the boundaries proposed in the petition were excluded, and certain properties beyond the proposed boundaries were included. A corn mill, in the occupation of the applicant, situate in *Walsden*, with the barn, stable, offices and outbuildings, and a close of land and railway therewith occupied; also another mill and thirty-nine dwelling houses, being a village in *Walsden*; and another mill situate in another part of the boundary, were not included within the boundaries proposed in the petition, and were wholly without and beyond the limits of the boundaries of the place from which the petition proceeded. These alterations were adopted by the Secretary of State in his order. In pursuance of that order a meeting of the ratepapers was duly convened and held on the 16th *February*, at which a resolution for the adoption of The Local Government Act, 1858, in "the *Todmorden* District" was carried. The applicant was not present at the meeting, and made no appeal, under sect. 17, against the adoption of the Act. But, on the 7th *March*, he appealed to the Secretary of State under sect. 18, stating that he disputed the validity of the vote for the adoption of the Act in "the District of *Todmorden*," on the grounds, first; that the boundary, as settled by the order upon which the vote proceeded, included a mill, buildings, land, and other rateable property in his occupation, situate, &c. none of which were or was comprised within the limits or boundary from within which the petition proceeded.

1861.

 Ex parte
SMITH.

1861.

Ex parte
SMITH.

Secondly; because there had been no petition for the adoption of the Act which embraced or comprised the said property in his occupation, and the order had been therefore made without jurisdiction. In consequence of that appeal the Secretary of State directed inquiry to be made into the circumstances of the case by the inspector. Such inquiry was made, and the result reported to the Secretary of State, who thereupon, under the provisions of the Act, by an order, dated 29th April, determined that the appeal be dismissed, and that The Local Government Act, 1858, should, after the expiration of one month from the date thereof, have the force of law within the District of *Todmorden*.

It was stated, in the affidavits in opposition to the rule, that the alterations suggested in the report of the inspector, and adopted by the Secretary of State in his order, rendered the boundaries of the whole district more eligible and satisfactory than those originally proposed; and that the petition to the Secretary of State was signed by about one-fifth of the ratepayers residing within the boundaries as settled by him.

Manisty shewed cause.—The first question is whether the Secretary of State could alter the boundaries proposed in the petition.

By the 1st and 2d paragraphs of sect. 16 of The Local Government Act, 1858, 21 & 22 *Vict. c. 98*, “any place not having a known or defined boundary,” may petition one of the Principal Secretaries of State “to settle its boundaries for the purposes of this Act.” And the petition shall state the proposed boundaries, and shall be signed by one-tenth of the ratepayers resident within the proposed boundaries. By the 5th paragraph the

Secretary of State "may upon consideration of the matter, either dismiss the petition altogether, or make order as to the boundaries of the place: he may also make order as to the costs of the proceedings under this section and the parties by whom such costs are to be borne." By the 6th paragraph, "any place the boundaries of which have been settled in pursuance of the foregoing provisions shall thenceforth, for the purposes of this Act, be deemed to be a place with a known and defined boundary, and may adopt this Act accordingly." The petition with the proposed boundaries is only to set the Secretary of State in motion: it is a mere suggestion that the place in which the petitioning ratepayers are resident would be a convenient place to be brought within the operation of the Act. Under the 5th paragraph of sect. 16 the Secretary of State may make what order he pleases "as to the boundaries of the place;" he may therefore adopt the proposed boundaries or reject them. By the 6th paragraph, after the Secretary of State has made an order, there is to be a meeting of the ratepayers to decide as to the adoption of the Act. [*Cockburn C. J.* If the new boundary, adopted by the Secretary of State upon the report of the inspector, added a considerable number of ratepayers who were not before within the district, their votes might turn the scale at the meeting to decide as to the adoption of the Act. *Blackburn J.* The number of ratepayers who signed the petition to the Secretary of State might not be one-tenth of the ratepayers in the extended district. But the term "to settle its boundary" seems to give the Secretary of State power to alter it.] It is as objectionable that he should diminish, as that he should increase, the area of the proposed district. [*Wightman J.* In the former case,

1861.

Ex parte
SMITH.

1861.

Ex parte
SMITH.

no ratepayer who objected would be brought under the operation of the Act.]

Secondly, the applicant, by resorting to sect. 18, which gives an appeal to any owner or ratepayer who disputes the validity of the vote for the adoption of the Act, has waived all objections anterior to the time of the passing of the resolution adopting the Act. He might have availed himself of sect. 17, which gives a right to petition the Secretary of State "if any number, being not less than one-twentieth of the owners and ratepayers of such place . . . are desirous that the whole or any part of such place should be excluded from the operation of the Act."

Thirdly, this application is too late. By sect. 20, whenever any resolution adopting the Act has been passed, the Act shall at the expiration of two months from the date thereof; or, in the event of an appeal, then at such time as may be mentioned in the order made on such appeal, have the force of law within such place. In this case the order of the Secretary of State dismissing the appeal, directed that The Local Government Act, 1858, should, after the expiration of one month from the date thereof, have the force of law. By sect. 81 all orders made by the Secretary of State, "in pursuance of this Act, shall be binding and conclusive in respect of the matters to which they refer." *Welsby*, who was with him, was not called upon.

Wheeler Serjt. and *Aspinall*, in support of the rule. First, there having been no petition of the ratepayers resident in part of the District included in the original order of the Secretary of State, and in respect whereof exemption is claimed from the operation of the Act, that

order is void, and all proceedings taken under it with respect to the settlement of the boundaries are irregular and illegal. This objection, though stated in the appeal to the Secretary of State was not open to the applicant on that appeal.

Secondly, it is not too late to obtain a certiorari. There is no appeal against any part of the order of the Secretary of State settling the boundary. The appeal given by sect. 17 is against the resolution adopting the Act. Section 18 only gives an appeal where "the validity of the vote for the adoption of the Act" is disputed; and applies to cases in which there is a dispute whether the meeting had been duly summoned, or whether the vote had been regularly taken—not where the objection is to the order, which is the authority for holding the meeting. By sect. 20, indeed, "whenever any resolution adopting this Act has passed in any place," the Act shall, after the expiration of a certain time "have the force of law within such place:" but that means a place the boundary of which has been legally settled.

Thirdly, there is no limitation of time within which an order of the Secretary of State may be questioned by certiorari. The limitation in sect. 21, by which "no objection whatever in respect of the matters mentioned in this section shall be admissible at any trial or in any legal proceeding after the expiration of six calendar months from the date of the constitution of the district," does not apply to this case. [*Cockburn C. J.* I have considerable doubt whether, on an appeal against the vote for the adoption of the Act, the boundary settled by the Secretary of State may be questioned: any ratepayer who is within that boundary would be entitled to vote at the

1861.

 Ex parte
SMITH.

1861.

Ex parte
SMITH.

meeting. And then there is no remedy except by coming to this Court. The vote for the adoption of the Act is unobjectionable so far as the boundary is concerned, because it was fixed by the order of the Secretary of State.]

WIGHTMAN J. I am of opinion that this rule must be discharged. It may be that the Secretary of State exceeded his power and proceeded irregularly in fixing the boundaries of this district so as to include property not originally comprised within the proposed boundaries; and he may, on consideration revoke, or he may make another order varying the original one. It may be a question whether he has power, under sect. 16 of The Local Government Act, 1858, 21 & 22 *Vict. c. 98.*, to make an alteration in the boundaries proposed in the petition of the ratepayers.

But, admitting that the order was irregular in that respect, there has been a resolution of the ratepayers for the adoption of the Act within the District. If the resolution was bad on the ground of the mode in which the boundary was fixed, that was matter of appeal under sect. 18; but, if not, the resolution remains unappealed against. Sect. 20 of stat. 21 & 22 *Vict. c. 98.*, which I most rely upon, says that the Act shall, "at the expiration of two months from the date of the passing of such resolution, or, in the event of an appeal . . . then at such times as may be mentioned in the order made on such appeal have the force of law within such place." The two months mentioned in sect. 20 having been suffered to elapse, it is now too late to question the regularity of the vote for the adoption of the Act. Whatever objection might have been made at an earlier stage in

the proceedings, the Act must now be taken to have the force of law within the district, and we cannot interfere.

1861.

Ex parte
SMITH.

BLACKBURN J. I am of the same opinion. Sect. 16 of stat. 21 & 22 *Vict. c. 98.*, seems to imply that it is incumbent on the petitioners to point out what they intend to be the proposed boundaries of the place; but the Secretary of State is to "settle its boundaries," and therefore he must have some power to alter the boundaries as proposed. Also it is said that he may "make an order as to the boundaries of the place:" that again looks as if he had a power to make some alteration in them. In this case the objection is that he has altered them by including a portion of the neighbourhood which was not included by the boundaries as proposed in the petition. I am not convinced whether he has or has not power to do that.

But, assuming that my brother *Wheeler* is well founded in his argument that the Secretary of State exceeded his authority, the applicant is out of time in making this application. By the sixth paragraph of sect. 16, "any place the boundaries of which have been settled in pursuance of the foregoing provisions shall thenceforth, for the purposes of this Act, be deemed to be a place with a known and defined boundary, and may adopt this Act accordingly." Therefore, whilst the order stood, whether it was an order capable of being impeached or not, the *Todmorden* District was a place with boundaries *de facto*; and, no certiorari being applied for to remove that order, the ratepayers might proceed to adopt the Act within the District. Then follow the sections giving a power of appeal against the resolution for

1861.

Ex parte
SMITH.

the adoption of the Act, and sect. 20 fixes the time at the expiration of which the Act shall have the force of law within the District. In this case two months from the date of the passing of the resolution having elapsed, and the date mentioned in the order dismissing the appeal having also passed, and the Act therefore having the force of law within the District; a certiorari is applied for, attacking the order of the Secretary of State under which this place has become a place with a defined boundary, and for the purpose of getting rid of the resolution on which the adoption of the act, which, by lapse of time, has acquired the force of law. It may be that the original order might have been removed by certiorari and quashed before the resolution for the adoption of the Act acquired the force of law. But it is too late to attack the foundation of the proceedings after the Act has acquired the force of law within the District.

COCKBURN C. J. I entertain serious doubts whether, under sect. 16 of stat. 21 & 22 *Vict. c. 98.*, it is competent for the Secretary of State, on a petition of ratepayers to settle the boundaries of a District for the purposes of the Act, to extend the area of the District beyond the limits proposed by the petitioners. I do not, however, deem it necessary to give our judgment upon this point. I only desire that it may not be implied from the judgment of the Court, on this rule, that we pronounce any decision on that point.

Upon the other question my mind is not thoroughly satisfied on two points; namely whether the sections of stat. 21 & 22 *Vict. c. 98.*, giving an appeal against the adoption of the Act, are applicable; or whether

resolution for the adoption of the Act is final and conclusive, after the time mentioned in sect. 20, unless the boundaries have been properly settled. I think it is open to considerable doubt whether, when the Secretary of State has exceeded his power, in settling the boundaries of this District, as must be assumed for the purpose of the present argument he has done, every thing which has taken place subsequently is not invalidated. But I do not wish that my doubts should have any effect in delaying the decision of this case, by taking time for consideration, or by hearing further argument.

Rule discharged.

1861. .

Ex parte
SMITH.

END OF TRINITY TERM.

TRINITY VACATION,

XXIV. & XXV. VICTORIA.

Thursday,
June 13th.

HOLLAND *against* RUSSELL.

Insurance.
Suppression
of material
fact.
Principal and
agent.
Money had
and received.

A., as agent for a foreign owner, entered into a policy of insurance on a ship in the usual form. At the time of effecting the insurance, *A.* was in possession of a letter from the captain, informing him that the ship had received injury, which fact he, without fraudulent intention to deceive, omitted to disclose to the underwriters. The ship was lost, and *B.*, one of the underwriters, paid to *A.* his amount of the insurance, but, having subsequently become acquainted with the above circumstance, brought an action for money had and received against him to recover it back. *A.*, before he was aware of *B.*'s intention to dispute the policy, and acting *bonâ fide* throughout, transmitted to his principal the money he had received from the various underwriters; with the exception of a certain amount for which he had allowed the principal credit in his settled account, and of another which, with the authority of the principal, he had expended in a suit brought by him on behalf of the principal against *C.*, another underwriter on the policy: held,

1. (In accordance with the decision in *Russell v. Thornton*, 4 H. & M. 788, affirmed on error, 6 *Id.* 140), that, in consequence of the concealment from the underwriters of the fact stated in the captain's letter, the policy was voidable at the election of the underwriters.

2. That *A.* being only an agent, of which *B.* was aware, and having without notice of *B.*'s intention to repudiate the contract, paid over to his principal the amount received from the underwriters, *B.* was not entitled to recover back from *A.* his amount of the insurance.

3. That there was no difference in this respect between the money actually paid over by *A.* to his principal, and the moneys which either had been allowed in account between them or expended in the suit against *C.*

4. *Quære*, whether *B.* would have been entitled to recover, if he had not known that *A.* was acting merely as agent?

THIS was an action for money paid, money had and received, and on accounts stated.

Plea, never indebted.

Issue.

At the trial, before *Cockburn C. J.*, at the *London* Sittings after *Hilary* Term, 1861, it appeared that the action was brought under the following circumstances. The plaintiff was an underwriter at *Lloyds*, and the defendant a ship and insurance broker, carrying on business in *London*. On the 19th *January*, 1857, the defendant, acting as agent for the owners of a steam ship called "*The Butjadingen*," who were resident in the duchy of *Oldenburgh*, effected a policy of insurance on the ship, from the 21st *January* 1857 to 20th *January* 1858; which policy was underwritten by the plaintiff for 200*l.* also by a person of the name of *Thornton* for 3000*l.*, and some others. The policy was in the usual form, and stated the insurance to be entered into by the defendant "as well in his own name, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all;" the value being fixed at 11,000*l.*, namely, 7000*l.* on the hull and materials, and 4000*l.* on the machinery. The insurance was effected by the defendant through the agency of Messrs. *Hodges & Johnson*, insurance brokers, the latter of whom was a member of *Lloyds*. At the time of the insurance the ship was abroad under a policy from the 20th *January* 1856 to 20th *January* 1857, and, a few days previous to the execution of the present policy, the defendant received a letter from the captain dated 6th *January* 1857, from *Carthagera* in *Spain*, stating that on the 2d of that month she had gone aground in the bay of *Almeria*, when she sprang a serious leak, and had reached *Carthagera* in a sinking state, at which place she was then undergoing repair. This information the defendant sent to *Lloyds*, where entry

1861.

HOLLAND
V.
RUSSELL.

1861.

HOLLAND

v.

RUSSELL.

was made of it in the book, and the plaintiff became aware of the fact; but at the time of effecting the policy he did not know that the defendant had received such a letter from the captain; for the defendant having been induced to believe that the statements in the letter were exaggerated, and knowing that the ship would be repaired under the previous insurance, did not think it necessary to communicate them to the underwriters. The ship was totally lost in *October* 1857, and in *December* of that year the amount for which the plaintiff had underwritten the policy was paid by him to the defendant. *Thornton*, however, who had also underwritten the policy, refused to pay his share of the loss, and an action was brought against him by the present defendant; in the course of which the circumstance of the receipt of the captain's letter having come to light, the defendant in that action succeeded, on the ground that the policy was void, a material fact having been concealed from the insurers by the assured. See *Russell v. Thornton*, 4 *H. & N.* 788, affirmed in the Exchequer Chamber, 6 *Id.* 140. The proceedings in *Russell v. Thornton* having given publicity to the fact that that letter had been received by the defendant before the policy was executed, the present plaintiff made application to him to have the amount which he had paid on the policy returned. With this the defendant refused to comply, and this action was accordingly brought. Before it was commenced, and before he had received any notice from the plaintiff of his claim to be repaid, the defendant had transmitted to his principals the whole of the money amounting in all to 8000*l.*, which he had received from the various underwriters on this policy, with the excep-

tion of two sums of 607*l.* 3*s.* 10*d.* and 608*l.* 10*s.* 11*d.* The first of these he accounted for with his principals thus: he had a claim against them for disbursements and commission, and in his account delivered at the end of the year he entered that sum of 607*l.* 3*s.* 10*d.* to their credit, and struck the balance, which proved in their favour, and credited them with that balance in the next year's account, both of which accounts were accepted and ratified by the principals. The latter sum he had, by the authority of his principals, applied towards the payment of the expences of the action of *Russell v. Thornton*, which amounted to nearly 1000*l.*

1861.

HOLLAND
v.
RUSSELL.

The Lord Chief Justice left to the jury to say whether the omission by the defendant to communicate the contents of the captain's letter to the underwriters was done with a fraudulent intention to deceive. The jury having found in the negative, a verdict was entered for the defendant; with leave to the plaintiff to move to enter the verdict for himself for 200*l.*, or such other sum as the Court should direct, if the Court should be of opinion that, upon the facts proved, he was entitled to recover back the sum paid by him to the defendant in ignorance of the letter; the Court having power to draw inferences of fact.

Bovill, in *Easter Term* 1861, obtained a rule accordingly.

This rule was argued during the Term, on the 30th *May*: before *Cockburn C. J.*, and *Wightman* and *Blackburn JJ.*

Lush and *Watkin Williams* shewed cause.—If this

VOL. I.

2 G

B. & S.

1861.
 HOLLAND
 v.
 RUSSELL.

action had been brought against the owners of the ship, the plaintiff would have been entitled to recover back this money as paid under a mistake of fact; for *Russell v. Thornton* (a) has decided that the non-communication of the captain's letter to the underwriters was an act vitiating the policy. But the defendant was only an agent acting for the owners of the ship and the rule of law deducible from the cases is that, where an agent who has received money for his principal pays it over to the principal, bonâ fide and without notice to the contrary from the party paying, the agent is not liable to refund if it turns out to have been paid through mistake of fact, but the party seeking to recover it back must sue the principal; *Buller v. Harrison* (b), *Cox v. Prentice* (c), *Murray v. Mann* (d), *Bone v. Ekless* (e). And the same rule holds although the agent has not actually paid the money to the principal,—it is enough if the agent has altered his position, on the faith of being allowed credit for the money; *Skyring v. Greenwood* (f). Here the agent has actually transmitted to the principal part of the money; some more has been allowed in account between them; and the residue has, with the consent of the principal, been appropriated by the agent in part liquidation of a debt incurred by the agent in bringing an action for the principal. It makes no difference whether the plaintiff knew that the defendant was an agent or not; but, at that point is material, the evidence shews that

(a) 4 H. & N. 788; affirmed on error, 6 Id. 140.

(b) Cowp. 565.

(c) 3 Mau. & S. 344.

(d) 2 Exch. 538.

(e) 5 H. & N. 925.

(f) 4 B. & C. 281.

did know it. All this is in accordance with the principle laid down by Lord *Mansfield* in *Moses v. Macferlan* (a), that the action for money had and received "lies only for money which, ex æquo et bono, the defendant ought to refund."

1861.

HOLLAND
v.
RUSSELL.

Bovill and *Honyman*, in support of the rule.—The first answer to the general argument of the other side is, that the defendant cannot be looked upon as a mere agent. He was a principal, or at least may be treated as such: for he employed brokers to effect this policy, it was effected in his name, the moneys due on the policy were paid to him, and he brought an action in his own name against one of the underwriters who refused to pay. The second answer is that the rule of law respecting the liability of agents, as stated by the other side, does not apply where the agent was the person who knew the fact the suppression of which vitiated the policy; *Snowdon v. Davis* (b), *Oates v. Hudson* (c) *Parker v. The Bristol Railway Company* (d): and it makes no difference that the suppression was not with fraudulent intent on his part. In *Carter v. Boehm* (e) Lord *Mansfield* says, p. 1909, "The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk, as if it did not exist. The keeping

(a) 2 Burr. 1005. 1012.

(b) 1 Taunt. 359.

(c) 6 Exch. 346.

(d) 6 Exch. 702.

(e) 3 Burr. 1905.

1861.
 HOLLAND
 v.
 RUSSELL.

back such circumstance is a *fraud*, and therefore the policy is void." Every man must be supposed to know the law; *Bilbie v. Lumley* (a). Where an auctioneer pays over to his principal the deposit money received from a purchaser, the purchaser may sue the auctioneer to recover it back, if a good title cannot be made; *Edwards v. Hodding* (b), *Gray v. Gutteridge* (c). [*Blackburn J.* There the auctioneer paid over money which he had no right to pay over. He was a stakeholder, and should have held the money until his agency was determined, whereas he took upon himself to determine it prematurely. *Wightman J.* Those cases do not apply.]

At least the plaintiff is entitled to recover the sums not actually paid over by the defendant to the principal. *Buller v. Harrison* (d), and *Cox v. Prentice* (e), which are relied on by the other side, shew this; and *Sweeting v. Pearce* (f) is to the same effect. *Skyring v. Greenwood* (g) is inconsistent with the subsequent case of *Dails v. Lloyd* (h). [*Blackburn J.* referred to *Livingstone v. Whiting* (i).] In *Story on Agency*, § 300, the law is thus laid down. "The liability of agents to third persons, on contracts, may also arise from acts done, or refused to be done, by such agents. Thus, for example, if a party, who has paid money to an agent for the use of his principal, becomes entitled to recall it, he may, upon notice to the agent, recall it, provided the agent has not paid it over to his principal, and also provided no change has taken place in the

(a) 2 *East*, 469.

(c) 3 *Car. & P.* 40.

(e) 3 *Mau. & S.* 344.

(g) 4 *B. & C.* 281.

(b) 5 *Taunt.* 815.

(d) *Coup.* 565.

(f) 7 *C. B. N. S.* 449.

(h) 12 *Q. B.* 531.

(i) 15 *Q. B.* 722.

situation of the agent since the payment to him, before such notice. The mere fact, that the agent has passed such money in account with his principal, or that he has made a rest in his accounts, without any new credit being given to the principal, will not of itself be sufficient to entitle the agent to retain the money, when the party entitled to recall it, demands it. But if a new credit has been given to the principal since the payment, or if bills have been accepted, or if advances have been made, on the footing of it, the payment cannot be recalled."

1861.

HOLLAND
v.
RUSSELL.

Cur. adv. vult.

The judgment of the Court was now delivered by

COCKBURN C. J. This is an action brought against the defendant, in whose name an insurance had been effected on a foreign vessel, called *The Butjadingen*, to recover back a sum of money paid by the plaintiff as one of the insurers, in ignorance of a certain fact the effect of which had been to make the insurance voidable, namely the omission of the defendant to communicate at the time of procuring the policy, (which was a time policy), information he had received that the vessel had got on shore and had sustained material damage. It was admitted on the part of the defendant that all question as to the validity of the policy was concluded by the decision of the Court of Exchequer in the case of *Russell v. Thornton* (a), and that, if the insurance had been effected by the defendant as principal, the amount paid by the plaintiff would have been recoverable back from him in this action. The defence rested on the fact that the defendant, in effecting the insurance in the name of him-

(a) 4 H. & N. 788; affirmed on error, 6 Id. 140.

1861.

HOLLAND
v.
RUSSELL.

self and those whom it might concern, had in reality acted only as the agent of the foreign owners, not being himself interested in the ship, and that, having received the payments on the insurance as their agent, he had either transmitted the amount or expended it by their direction, or had given them credit for it in an account finally settled between him and them, prior to any notice of objection by the plaintiff to his parting with the money.

It appeared that the defendant, having received on the policy, which was effected for 11,000*l.*, sums amounting to 8000*l.*, had transmitted that amount to his principals; minus two sums, one of 607*l.* 3*s.* 10*d.*, and the other of 608*l.* 10*s.* 11*d.* The former of these two sums he had allowed in account with his principals in respect of a claim of his own against them for disbursements and commission; the latter he had retained by their authority, to defray the expenses of the suit against *Thornton* for the amount underwritten for on the policy by the latter.

Under these circumstances it was contended that the case came within the principle that an agent having received money on account of his principal and paid it over to the principal without notice to the contrary, is absolved from responsibility to the party from whom he received it; and that the defendant, having received the money as agent and paid it to, or on account of his principals, or allowed it conclusively in account with them, without any notice of revocation, could not be called upon to refund. To this it was answered on the part of the plaintiff that the policy having been effected in the name of the defendant, the payment must be taken to have been made to him as principal. With reference to this point, w

are of opinion that the plaintiff fails upon the facts. Not only is it clear that the defendant was acting solely as agent, but (the Court having power to draw inferences of fact) we are of opinion that the plaintiff was aware that the defendant was acting as agent for the foreign owners, and as such, made to him the payment of the money he now seeks to recover back. It is, therefore, unnecessary to consider the proposition contended for on behalf of the defendant, that the mere fact of the defendant having been an agent would have been sufficient to raise this defence, even if the plaintiff had not known him to be such at the time the payment was made.

Secondly, it was contended for the plaintiff that, although the jury have negatived any intentional fraud on the part of the defendant, yet as the suppression of a material fact whereby the policy became vitiated was throughout known to the defendant, the receipt of the money and the transmission of it to his principals could not be held to be other than a fraud in law, and that the defendant must be considered as in the same position as though he had received notice not to pay over the money on the ground that the policy had been found to be open to the exception now taken. To this contention we think a sufficient answer is afforded by the combined facts, first, that the proceedings of the defendant were throughout *bonâ fide*—he having been led to believe that the representation of the master as to the damage the ship had sustained was exaggerated, and also that, as the damage would be made good under a prior insurance, its existence need not be communicated on the proposal for the new policy; and, secondly, that the effect of the concealment complained of was not to

1861.

HOLLAND
V.
RUSSELL.

1861.
 HOLLAND
 v.
 RUSSELL.

make the policy void, but voidable only. Under these circumstances the defendant, receiving the money for his principals, not only without any notice that exception would be taken to the policy, but, further, with a full belief that none would be taken, did no more than discharge his duty in handing over the money. We see no reason, therefore, to exclude him from the benefit of the rule that an agent receiving money on account of his principal and paying it over to the principal, without notice to the contrary, is protected against any claim which the party from whom it was received would have had if the money had still remained in his hands. Where money so paid to an agent has once been *bonâ fide* parted with, without notice, the liability of the agent ceases, and the claim of the party paying it can be enforced only against the principal to whom the money has been handed over.

The arguments we have thus far been considering have reference to the entire amount received by the defendant. But, it was further contended on behalf of the plaintiff that, even if the foregoing rule should be held to protect the defendant as to the amount which he had actually transmitted to his principals, the two sums of 607*l.* 3*s.* 10*d.* and 608*l.* 10*s.* 11*d.*—the first of which he had retained to satisfy his own claim on his principals, the second to meet the expences of the action against *Thornton*—stood on a different footing, and that, as to these sums, the defendant, not having actually parted with them, was still liable to the plaintiff.

As to the first of these sums we were pressed on the argument with the authority of the cases of *Bull* v. *Harrison* (a), and *Cox v. Prentice* (b), in which it was

(a) *Cowp.* 565.

(b) 3 *Mau.* & *S.* 344.

held that an agent having merely carried money received by him to the credit of the principal in a debtor and creditor account, although he had transmitted such account to the principal, still remained liable to the party by whom the money had been paid and who on sufficient cause demanded its repayment. While we fully recognise the authority of these cases, we are of opinion that the present case stands on a different footing. In those cases, the account being still open between the parties, the position of the agent was not prejudiced by having to refund the money. In the present case the defendant, having a claim against his principals, transmits to them an account made up to the end of the year, in which giving them credit for the amount received on this policy, he debits them with the amount of his claim, and strikes a balance which proves to be in their favour. With this balance he credits them in a further account for the ensuing year, which account was afterwards transmitted to them in due course. Both accounts were adopted and agreed to by the principals. The account thus became a settled account between the parties; and the transaction is in effect the same as though the agent had paid over the whole amount to the principals and had received back the amount of his claim. He cannot, any more than he could in the case lastly put, call upon the principals to pay over again; and he ought, therefore, to be equally held free from liability to the opposite party.

The question as to the sum of 608*l.* 10*s.* 11*d.* expended in the prosecution of the action against *Thornton* appears to us free from difficulty. This sum, which it may be assumed would otherwise have been transmitted to the principals, was by their assent and desire retained for the purpose

1861.

HOLLAND
v.
RUSSELL.

1861.

HOLLAND
v.
RUSSELL.

of its being applied to the carrying on of a suit *bonâ fide* instituted and prosecuted on their behalf. This expenditure, having been made by the direction of the principals, is, therefore, equivalent to a payment actually made to them; and the defendant must be considered in the same position as though he had handed over the amount.

Our judgment is based throughout on the assumption, as fully warranted by the finding of the jury and the evidence, that the defendant acted all along *bonâ fide*, and without knowledge of any objection on the part of the plaintiff to his parting with the money to or on account of his principals. Although the defendant made the fatal mistake of withholding the information he had received as to the state of the ship, the jury have found that he did so without any intention of fraud; nor was any objection put forward by the insurers, who had paid on the policy till after the trial of the action of *Russell v. Thornton* (a), in which the ground of exception was for the first time disclosed. The appropriation of the money had in the meantime been made by the defendant without knowledge of the ground of exception, or that the policy was liable to be avoided, still less that the plaintiff would seek to repudiate the contract.

Under these circumstances we are of opinion that the defendant cannot be called upon to refund, and consequently that this rule must be discharged.

Rule discharged.

(a) 4 H. & N. 788; affirmed on error, 6 Id. 140.

1861.

MELLORS *against* SHAW and UNWIN.Friday,
June 21st.

Declaration stated that defendants were owners of a coal mine, and plaintiff was employed by defendants as a collier in the mine, and in the course of his employment it was necessary for him to descend and ascend through a shaft constructed by defendants; that by the negligence of defendants the shaft was constructed unsafely, and was, by reason of not being sufficiently lined or cased, in an unsafe condition, which defendants well knew: and by reason of the premises, and also by reason, as defendants well knew, of no sufficient or proper apparatus having been provided by defendants to protect plaintiff from injuries arising from the unsafe state of the shaft, a stone fell from the side of the shaft on the head of the plaintiff, and he was dangerously wounded. Plea, not guilty. At the trial it was proved that *S.*, one of the two defendants, was manager of the mine, and that it was worked under his personal superintendence; and that the plaintiff was not aware of the state of the shaft. The jury found that the defendants were guilty of personal negligence. Held,

Master and servant.
Negligence of master.
Partners.
Joint liability.
Scintilla of evidence.

1. On motion to enter a nonsuit, that on this finding of the jury *S.* was liable, and therefore the other defendant was liable also.

2. On motion in arrest of judgment that the declaration must be taken to allege personal knowledge in the defendants of the state of the shaft, and therefore the action was maintainable.

3. Per *Crompton J.* The doctrine that if there is only a scintilla of evidence for the jury the verdict of the jury is not to be disturbed, is now exploded.

THE declaration stated that the defendants, at the time of the committing of the grievances therein-after mentioned, were the owners of a certain coal mine, and the plaintiff was employed by the defendants as a collier, to do certain work for the defendants in the said mine, and in the course of his employment it was necessary for him to descend into the said mine, and ascend therefrom, through a certain shaft of the said mine, also constructed by the defendants. It then alleged that, by the negligence and fault of the defendants, the shaft was constructed unsafely, and in a defective and improper manner, and was, by reason of not being sufficiently lined or cased, in an unsafe and unfit condition for being used for the purpose aforesaid, which the defendants well knew; and by reason of the

1861.

MELLORS
v.
SHAW.

premises, and also by reason, as the defendants well knew, of no sufficient or proper apparatus having been provided by the defendants to protect the plaintiff while so employed by them, in the mine as aforesaid, from injuries arising from the unsafe state of the shaft, while the plaintiff was in the course of his employment ascending the shaft, a large stone fell from the side of the shaft on the head of the plaintiff, and thereby the plaintiff was dangerously wounded, &c.

Plea, not guilty.

On the trial, before *Keating J.*, at the *Lent Assize* for *Yorkshire* in 1861, it appeared that the plaintiff, at the time of the accident, was a pitman in the employment of the defendants, who were owners of a colliery at *Brightside*, near *Sheffield*. The defendant *Shaw* was the manager of the colliery, and it was worked under his personal superintendence. The shaft in which the injury was received by the plaintiff had been sunk about six years, and, until *June* 1859, it had been used as an air shaft, with fire at the bottom, for causing a draught upwards: it was then converted into, and at the time of the accident in *May*, 1860, was used as a drawing shaft. It passed through several strata, one of which was argillaceous stone, called "bind." The "bind," under the action of the air and heat, when the shaft was used as an air shaft, would be subject to crumble and fall, and when it was converted into a drawing shaft, it would have been safer to have cased or lined it throughout. In fact only a portion of the shaft at the top, and another portion at the bottom, were cased or lined. In order to protect the men from any thing falling from the side of the shaft, while ascending or descending, it had become a common precaution to put metal covering

called "bonnets," over the cages in which the men were let down or drawn up. Two "bonnets" had been provided by the defendants; but neither of them was over the cage in which the plaintiff was being drawn up at the time he received the injury. The plaintiff had been in the employment of the defendants about three years ago; he then left, and returned to them about a fortnight before the accident. He did not know that the shaft was not cased or lined all the way. Evidence was given for the defendants to shew that they exercised the same ordinary care and vigilance as was used in collieries in the neighbourhood to keep the shafts safe; that the shaft had been safely used for six years before the accident, and without remonstrance or notice to them that it was dangerous. Upon the evidence it was doubtful whether the injury to the plaintiff was caused by the falling of "bind" from the sides of the shaft, or by the plaintiff's head striking one of the stays in the shaft. Independently of this question of fact, it was contended, on behalf of the defendants, that there was no evidence that the defendants knew that the shaft was not in a condition fit to be used, nor any evidence of personal negligence on their part. The learned Judge having declined to nonsuit, the jury found that the defendants were guilty of personal negligence both as to the state of the shaft and as to the cage not being covered with a bonnet; and gave a verdict for the plaintiff for 150*l*. Leave was reserved to the plaintiff to move to enter a nonsuit if the Court should be of opinion that there was no evidence to go to the jury.

In the following *Easter Term*,

Monk obtained a rule to shew cause accordingly, or in arrest of judgment on the ground that the declaration did not shew any cause of action.

1861.

MELLORS

V.
SHAW.

1861.

 MELLORS
 v.
 SHAW.

Manisty and *Quain* shewed cause.—First, both the defendants are liable. Though the defendant *Shaw* was acting as manager, he was also acting as a partner, and the negligence of one partner is imputable to the other so that, if the defendant *Shaw* is liable, the defendant *Unwin* is liable also; *Ashworth v. Stanwix* (a). Now there was reasonable evidence for the jury both as to the cause of the accident and of personal negligence in the defendant *Shaw*. There was a statutory duty on the defendants to case or line the shaft. By rule 4 of the General Rules to be observed in every coal mine by the owner, contained in sect. 4 of stat. 18 & 19 *Vict. c.* 108. “Every working and pumping pit or shaft where the natural strata under ordinary circumstances are not safe shall be secured, cased or lined.”

Secondly, the declaration states a good cause of action, by alleging negligence in the defendants. the plaintiff knew the insecure state of the shaft, of the machinery, and took the risk upon himself so as to exempt the master, according to the decision in *Priestley v. Fowler* (b), the allegation that the accident was caused by the negligence of the defendants would not be supported. In *Roberts v. Smith* (c), where the Exchequer Chamber held that there was evidence to the jury that the accident was caused by the negligence of the defendants, the declaration did not contain an allegation that the plaintiff did not know the bad condition of the putlogs. The rule of pleading is that each pleading should contain a good *primâ facie* case.

T. Jones (of the Northern Circuit), *contra*.—First, the finding of the jury, that the injury to the plaintiff was

(a) 30 *L. J. Q. B.* 183; 8 *C. 7 Jur. N. S.* 467.(b) 3 *M. & W.* 1.(c) 2 *H. & N.* 213.

caused by the falling of the "bind," was unreasonable. [Blackburn J. On the question of entering a nonsuit, we must take the case as it stands upon the evidence for the plaintiff.] There was no reasonable evidence in support of the declaration. The declaration alleges that the defendants knew that the shaft was in an unsafe condition. [Blackburn J. If the defendants ought to have known that it was in an unsafe condition, the declaration is proved.]

1861.

MELLORES
v.
SHAW.

Secondly, it is not alleged in the declaration that the plaintiff did not know the state of the shaft and of the machinery. According to the doctrine laid down in *Priestley v. Fowler* (a), a master is not liable to his servant for injury which he receives in the service, where the servant enters into the service with a knowledge of the risk of injury which he incurs. The principle in that case, and in *Wigmore v. Jay* (b), is that the servant accepts those risks of the service. [Crompton J. In *Bartonskill Coal Company, apps., Reid, resp.* (c), Lord Cranworth states it as "a principle established by many cases that, when a master employs his servant in a work of danger, he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition." Whether, if injury accrued to a servant so employed, it would be sufficient to shew that the master had not put his tackle and machinery in a safe and proper condition, it is not necessary in this case to consider; because the declaration alleges that there was knowledge in the defendants that the shaft and machinery were not in a safe state. Blackburn J. The declaration in *Priestley v. Fowler* (a) contained no such allegation; Lord Abinger, in delivering the judgment

(a) 3 M. & W. 1.

(b) 5 Erch. 354.

(c) 3 Macq. 266, 288.

1861.

MELLORS

v.
SHAW.

of the Court, said, p. 5, "As the declaration contains charge that the defendant knew any of the defects mentioned, the Court is not called upon to decide how such knowledge on his part of a defect unknown to servant would make him liable."'] In the cases in which the master has been held liable, there have been special circumstances taking them out of the general rule.

Roberts v. Smith, in the Exchequer Chamber (a), the servant had no reason to suspect the bad condition of the putlogs: the master entrapped him into the use of them [Blackburn J. referred to *Dynen v. Leach* (b).] The liability of the master for an injury to a servant from the negligence of a fellow servant is an application of the principle in *Priestley v. Fowler*; the servant enters service with a knowledge that he incurs that risk. In *Wigmore v. Jay* (c), *Wigget v. Fox* (d). In *Tarrant v. Webb* (e), an exception to the rule was introduced where the master was guilty of want of care in the selection of proper servants.

WIGHTMAN J. had gone to Chambers.

CROMPTON J. After the decision of this Court in *Ashworth v. Stanwix* (f), which I think was a reversal of the decision, we must hold that if the defendant *Shaw* is liable for personal negligence, his partner, the other defendant, is liable also.

The first question then in the case is, whether there was evidence to go to the jury of negligence against the defendant *Shaw*. I should have arrived at a different conclusion from that to which

(a) 2 H. & N. 213.

(b) 26 L. J. N. S. Exch. 221.

(c) 5 Exch. 354.

(d) 11 Exch. 832.

(e) 18 C. B. 797.

(f) 30 L. J. Q. B. 183; 7 Jur. N. S. 467.

the jury came upon the evidence before them, but there could be a fresh inquiry only on payment of costs, which the defendants, acting I doubt not wisely, have declined to ask for. The doctrine that, if there was only a scintilla of evidence for the jury, the verdict is not to be disturbed, has been exploded (a); but we must not, on that account, promulgate the motion that, though there was substantial evidence to be left to the jury, we will send a case down again and again; otherwise we may do away with trial by jury altogether. It would be going too far to say that there was no case for the jury on this evidence, though I am not satisfied that the verdict was right. [His Lordship commented on the evidence.]

1861.

MELLORS

v.

SHAW.

Then, it is said that the case falls within the principle of *Priestley v. Fowler* (b), and that class of cases in which an action against the master has been held not maintainable. I have thought that case rather inconsistent with the later cases on the subject; but, considering what was said by my brothers in those cases, and seeing, as my brother *Blackburn* has pointed out, that the declaration in *Priestley v. Fowler* (b) contained no allegation that the defendant knew the defects in the van in which the plaintiff was placed, I conceive that the rule laid down in that case, that a servant on entering the service of an employer takes upon himself the risks of the service, does not apply where there has been personal negligence in the master which causes the injury to the servant. This Court said so in *Ashworth v. Stanwix* (c);

(a) See *Avery v. Bowden*, in error, 6 E. & B. 953. 962. 973; *Wheelton v. Hardisty*, 8 E. & B. 232. 262; *Toomey v. The London, Brighton and South Coast Railway Company*, 3 C. B. N. S. 146.

(b) 3 M. & W. 1.

(c) 30 L. J. Q. B. 183; S. C. 7 Jur. N. S. 467.

1861.

 MELLOES
 v.
 SHAW.

and in *Roberts v. Smith* (a), in the Exchequer Chamber, the rule for a new trial was made absolute, upon the ground that there appeared to have been evidence of "the personal interference and negligence of the master." In *Tarrant v. Webb* (b), the Judges said that want of care in the selection of competent servants would be one instance of negligence. The same law is laid down in *Ormond v. Holland* (c), where the master did not personally interfere, and therefore he was not liable: I said, p. 106, "I think that the rule of law laid down by Mr. Hill is accurate, namely that the master is not liable unless there be personal negligence on his part, which negligence may be either in personally interfering in the work, or in selecting the servants who do interfere." Mr. Jones contends that, to render the master liable, there must be actual personal interference on his part, so as to lay a trap for the servant in the particular matter from which he received the injury. I do not agree to that; I think it is negligence for which the master is liable, if he knows that the machinery or tackle to be used by the persons employed by him is improper or unsafe, and notwithstanding that knowledge sanctions its use, as in *Roberts v. Smith* (d), though there may be a doubt as to his liability where the servant is aware of the defective state of the machinery, and so may be presumed to have taken upon himself the extra risk for the sake of extra wages. *Dynen v. Leach* (e) is the case most in favour of Mr. Jones's argument; but that was decided before the recent cases on the subject, and in that case the workman did the act which directly caused his death, and he knowingly used a dangerous machine.

(a) 2 H. & N. 213. 218.

(b) 18 C. B. 797.

(c) E. B. & E. 102.

(d) 2 H. & N. 218.

(e) 26 L. J. N. S. Exch. 221.

chine. In this case the evidence of the plaintiff was, that he did not know that the shaft was not lined throughout. The principle in *Priestley v. Fowler* (a) is subject to the exception involved in the case which Lord Abinger said, p. 5, the Court was not called upon to decide: if there is personal negligence in the master he is liable, and if he knows the defects which cause the injury, that is evidence of personal negligence. In this case there is some evidence of such knowledge, and therefore this action is maintainable.

This disposes of the other part of the rule for arresting the judgment, because, if the declaration is defective in form, it might be cured by amendment.

The rule therefore must be discharged.

BLACKBURN J. I am of the same opinion. The verdict appears to me not to be satisfactory; but there was, in the plaintiff's case, enough evidence of the cause of action to go to the jury and that was uncontradicted by the evidence for the defendants. There was certainly some evidence from which the jury might reasonably draw the conclusion that the injury was caused by the "bind" falling upon the plaintiff; and the sides of the shaft were in such a state as to be some evidence of negligence in the defendant *Shaw* in keeping it unlined. Then *Shaw*, one of the defendants, being engaged in working the mine, *Ashworth v. Stanwix* (b) establishes that, if he is liable as master, the other defendant is liable as master also. We cannot, therefore, make the rule absolute to enter a nonsuit.

1861.

MELLORS
v.
SHAW.

(a) 3 M. & W. 1.

(b) 30 L. J. Q. B. 183. S. C. 7 Jur. N. S. 467.

1861.

MELLORS

v.
SHAW.

The question therefore is, whether the defendant *Shaw* is liable. In *Priestley v. Fowler* (a) the objection, as stated by Lord *Abinger*, p. 5, was "that from the mere relation of master and servant no contract, and therefore no duty, could be implied on the part of the master to cause the servant to be safely and securely carried, or to make the master liable for damage to the servant, arising from any vice or imperfection, unknown to the master, in the carriage, or in the mode of loading or conducting it." The ground of the decision is that there was no warranty on the part of the master that the carriage should be free from defects or that no injury should happen to his servant. Much reasoning follows in Lord *Abinger's* judgment, which introduced a new branch of law, viz., that the master is not liable to his servant for the misconduct or negligence of others who serve him. *Roberts v. Smith* (b), in the Exchequer Chamber, however, establishes that, where the injury has been caused by the personal interference or negligence of the master, the servant may maintain an action against his master. There is this exception, that the right of action against the master does not extend to a case where the negligence of a fellow-servant causes the injury: the master is not identified with the servant for the purpose of making him liable for the servant's negligence. There is probably another exception where the master has furnished instruments or machinery which are dangerous, but the servant knows that they are dangerous, and the danger is so normal that it is in the ordinary course of the employment: in that case the servant cannot complain of an injury which he has sustained, because he undertook the employment with that risk. *Dynen v. Leach* (c) may be

(a) 3 M. & W. 1.

(b) 2 H. & N. 213.

(c) 26 L. J. N. S. Exch. 221.

supported on that ground; in that case there was nothing to shew that the master knew, and that the servant did not know, the dangerous state of the machine; therefore the plaintiff was in the position of a servant taking the employment with the accompanying risk, induced to do so by high wages. In this case there was such evidence; and therefore the ground of non-liability does not apply.

The question on the rule for arresting the judgment is the same as that we have been discussing: the declaration must be understood to allege that, by the personal negligence of the defendants, the shaft was in an unsafe state, and that the defendants had personal knowledge of that unsafe state, which make the cause of action.

Rule discharged.

1861.

MELLORS
v.
SHAW.

The QUEEN *against* The Inhabitants of BRIGHTON.

Tuesday,
June 26th.

1. The marriage of a man with the daughter of the half sister of his deceased wife is null and void by stat. 5 & 6 W. 4. c. 54.

2. A marriage within the prohibited degrees of consanguinity or affinity is null and void, although one of the parties is illegitimate.

Marriage.
5 & 6 W. 4.
c. 54.

Daughter of
deceased wife's
sister.
Illegitimacy.

UPON an appeal, at the *Michaelmas* Quarter Sessions for the county of *Middlesex*, A. D. 1860, against an order of two justices for the removal of *Elizabeth Morgan* from the township of *New Brentford*, in the county of *Middlesex*, to the parish of *Brighton*, in the county of *Sussex*, the Court confirmed the order subject to the opinion of this Court, upon the following case.

Elizabeth Morgan, the pauper, was alleged to be settled in *Brighton* by reason only of her marriage with *John Morgan*, whose settlement in *Brighton* is admitted,

hibited degrees intended by that statute, being those declared by the Legislature of *Henry* the 8th's time to be the degrees prohibited by God's law. But those degrees are not enumerated, except in the repealed stat. 25 *H. 8. c. 22. s. 3.*, and in stat. 28 *H. 8. c. 7. s. 7.*, in nearly the same words. The judgment of the Court for Divorce and Matrimonial Causes in *Wing v. Taylor* (a), decided that stat. 28 *H. 8. c. 7.* also was repealed by stat. 1 & 2 *Ph. & M. c. 8.*, and was not revived by stat. 1 *El. c. 1.*: so that stat. 32 *H. 8. c. 38.* gives the rule by which it must be judged, whether parties may lawfully marry or not; which rule is that all parties may lawfully marry who are not prohibited by God's law to marry, and that "no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees." [*Wightman J. Regina v. Chadwick, in error* (b), was decided after much argument and much consideration.] This degree is not mentioned in the Book of *Leviticus*. The first prohibition mentioning a wife's sister's daughter is in the table set forth in 1563, which is sanctioned by the 99th Canon of the Canons of 1603; 2 *Burn, Eccl. Law, by Phillimore*, 443, 446; but those Canons do not bind the laity proprio vigore (c). It must be admitted that the Ecclesiastical Courts have held marriages within these degrees void, and that prohibition, on that account, has been refused. In *Wortley v. Watkinson* (d) a consultation was awarded, but the inclination of the opinion of the Court was that the marriage with the daughter of the deceased wife's sister was valid. [They also cited *Snowling v. Nursey* (e).] Further, stat. 32 *H. 8. c. 38. s. 2.* requires

1861.

The QUEEN
v.
Inhabitants of
BRIGHTON.

(a) 7 *Jur. N. S.* 737.(b) 11 *Q. B.* 173.(c) See *Middleton v. Crofts*, 2 *Atk.* 650. 653.(d) 2 *Lev.* 254; 3 *Keb.* 660; *T. Jones*, 118.(e) 2 *Lutw.* 1075.

1861.

THE QUEEN
v.
Inhabitants of
BRIGHTON.

that the marriage should be consummated ; and the case is silent as to that fact. [*Cockburn C. J.* That point is not raised by the case. *Blackburn J.* If necessary, it would be presumed that the marriage was consummated. Affinity is different from consanguinity. In *Woods v. Woods (a)*, which was a proceeding in the Consistory Court of *London* for incest against a man, for marrying his niece, *Dr. Lushington*, said, p. 529, "whatever ideas may be entertained with regard to marriages between persons within the degrees of affinity, there is no difference of opinion in respect to marriages of this kind, where the parties are connected by consanguinity."

2. The law as to marriage within prohibited degrees does not extend to the daughter of an illegitimate half-sister of the wife. In *Regina v. St. Giles in the Fields (b)* where the question was whether the marriage of a man with the illegitimate sister of his deceased wife was valid the judgment was suspended (p. 235—236) to await the result of the decision in *Regina v. Chadwick, in error (c)* but no writ of error was brought in that case, and the following short judgment was given, p. 244: "We think that this case is the same in principle with *Regina v. Chadwick*, and that the particular facts make no difference." In *Regina v. St. Giles in the Fields (b)* the illegitimate sister was the child of both the parents of the deceased wife. In *Wing v. Taylor (d)*, where the husband, before his marriage, had connexion with his wife's mother, it was held that the marriage was not void, as the prohibitions by God's law assume that marriage is necessary to create the degree of affinity which renders a subsequent marriage unlawful. [*Cockburn C. J.* All the considerations on which the law prohibiting marriages within

(a) 2 *Curt.* 516.(b) 11 *Q. B.* 173.(c) 11 *Q. B.* 205.(d) 7 *Jur. N. S.* 737.

certain degrees is founded are applicable to illegitimate relations, otherwise an illegitimate brother might marry a sister. *Wightman J.* In *Hains v. Jeffell (a)* the question, whether a marriage with the illegitimate daughter of a sister was valid, arose upon a prohibition to the spiritual Court, but the cause was adjourned. *Cockburn C. J.* Suppose persons living under the Scotch law have two illegitimate children, who marry each other; and the parents afterwards marry each other; the children thereupon become legitimate; and then there is a marriage subsisting between a legitimate brother and sister, although in the eye of the law there is no relationship in blood.] Suppose a woman, whose parents are not known, marries a man, afterwards discovered to be her brother, is the marriage to be declared void? [*Cockburn C. J.* That is a remote possibility, which is no ground for saying that, when a relationship is known, a marriage between persons within the prohibited degrees is legal.] The relationship of illegitimate children is not recognised by the law either in the case of real descent or personal succession; and therefore the dictum of *Buller J.*, in *Rex v. Hodnett (b)*, that "the rule that a bastard is nullius filius applies only to the case of inheritances," is not fully borne out. [*Cockburn C. J.* The father of an illegitimate child is not recognized by the law of England as to civil purposes (c); but in that it differs from the law of other countries.] In *Rex v. Hodnett (b)* and *Priestly v. Hughes (d)* it was held that illegitimate

1861.

The QUEEN
v.
Inhabitants of
BRIGHTON.

(a) 1 *Ld. Raym.* 68; *S. C. nom. Haines v. Jescott*, 5 *Mod.* 168; *S. C. nom. Hains v. Jescott*, *Comb.* 356; *S. C. nom. Haines v. Jeffreys*, 1 *Com.* 2.

(b) 1 *T. R.* 96. 101.

(c) See *Reg. v. Chafin*, 3 *Salk.* 66.

(d) 11 *East*, 1.

1861.

The QUEEN
v.
Inhabitants of
BRIGHTON.

children were within the provisions of The Marriage Act, 26 G. 2. c. 33., which required the consent of the father to the marriage of persons under age; *Grose J.* dissented from the other Judges in the last case. And in *Horner v. Liddiard* (a) Lord Stowell held that the consent of parents under that statute was applicable to the marriage of illegitimate minors. [Cockburn C. J. In note (1) to stat. 25 H. 8. c. 22., in *English Statutes*, vol. 1, p. 152., a report of Lord Stowell's judgment in that case, by Dr. Croke, is mentioned (b). *Matthews*, contra. The judgment in that report, which is accompanied by a short statement of facts, is the same as in 1 *Hagg. Cons. Rep.* Cockburn C. J. Although the Court did not give any final determination upon the question in *Hains v. Jeffell* (c), they expressed a strong opinion upon the point. According to that case, reported in 1 *Ld. Raym.* 68: "It seemed to the Court that no prohibition should be granted; for, though bastards are deprived of privileges by particular statutes, the same reason prohibits them from marrying, as of illegitimacy. And it has been always held accordingly, especially where it is the child of a woman relation. And according to Sir Bartholomew Shower's rule, *Hains* might marry his own bastard, which doubtless could not be allowed. Then Lord Stowell in *Horner v. Liddiard* (a), speaking of *Hains v. Jeffell*, says, p. 353: "The cause was argued, and therefore no decision was given upon the question; although undoubtedly the Ecclesiastical

(a) 1 *Hagg. Cons. Rep.* 337.

(b) It is also referred to in the argument in *Priestley v. Priestley*, 11 *East*, 16.

(c) 1 *Ld. Raym.* 68. S. C. nom. *Haines v. Jescott*, 5 *Mod.* 168. S. C. nom. *Hains v. Jescott*, *Comb.* 356. S. C. nom. *Haines v. Jeffreys*, 1

Court, the proper forum on questions of that nature, conceived that that marriage came within the reach of the prohibition ;" and it was assumed by him that illegitimacy made no difference in the application of the rules of prohibition of marriage, which he says, p. 353, " arise out of natural relations," and, " as they are taken from the law of God, and have one common origin therein, they are all considered as of the same moral nature and obligation "(a).] The law of *Scotland*, in dealing with the crime of incest, does not recognise any affinity between bastards, though in all questions of marriage and legitimacy the Canon law is said to be the law of *Scotland*; *Shelford on the Law of Marriage and Divorce*, pp. 21, 22, citing *Bell's Case of Putative Marriage*. In *Alison's Principles of the Criminal Law of Scotland*, vol. 1, after defining incest, chap. 29, s. 1, p. 562: " Incest is committed by carnal knowledge between all those persons who are forbidden to marry in the Divine law ;" it is laid down, s. 2, p. 565, that " incest is not committed by connexion with bastard relations, how near soever," citing *Hume Comm. on the Law of Scotland respecting Crimes*, vol. 1, p. 452. [*Blackburn J.* By the statute law in *Scotland* incest was a capital offence (b), and, in favorem vitæ, such connexion was held not to be incest.]

1861.

The QUEEN
v.
Inhabitants of
BRIGHTON.

G. Denman and *H. Matthews*, for the appellants.—
[*Cockburn C. J.* It would be a great scandal if it was thought that the Court doubted that a marriage, unlawful between legitimate relations, was equally so between natural relations, though one of them was illegitimate.

(a) See *Dr. Lushington in Woods v. Woods*, 2 *Curt.* 518. 522.

(b) See *Hume's Commentary on the Law of Scotland*, vol. 1, p. 448.

1861.

The QUEEN
v.
Inhabitants of
BRIGHTON.

Therefore the Court wish the argument for the appellant to be confined to the question, whether a marriage with the daughter of a deceased wife's sister is void.] As to that question, *Regina v. Chadwick*, in error (*a*), governs this case. In that case, and in *Brook v. Brook* the House of Lords (*b*), it was said that the legislation of Henry the Eighth's time, in stat. 25 H. 8. c. 22. s. 28 H. 8. c. 7. s. 7. and 32 H. 8. c. 38., which are *pari materiâ*, had laid down what were the "prohibited degrees of consanguinity or affinity" intended by stat. 5 & 6 W. 4. c. 54. s. 2., and what marriages are prohibited as "contrary to God's law," as being within the *Levitical* degrees. The question whether stat. 28 H. 8. c. 7. is repealed or not is discussed by Lord Wensleydale in *Brook v. Brook* (*b*), and he came to the conclusion that the part of it which contains an enumeration of the prohibited degrees within which marriage is unlawful, which was repealed by stat. 1 & 2 Ph. & M. c. 8. s. 17., was revived by stat. 1 El. c. 1. s. 2.; he adds, p. 432: "But, whether it is or not, the statements in the statute are to be looked upon as a statutory exposition of the meaning of the term 'Levitical degrees.'" If stat. 28 H. 8. c. 7. is repealed, the reference to its provisions in sect. 2 of stat. 28 H. 8. c. 16., which is still in force, sufficiently incorporates them to make them part of stat. 28 H. 8. c. 16. In the enumeration of prohibited degrees in stat. 25 H. 8. c. 22. s. 3., is the marriage between "the son" and "the uncle's wife;" and this prohibition applies when the sexes are changed, and prevents "the daughter" from marrying "her aunt's husband." The statute indicates the degrees of relationship in which persons standing towards each

(a) 11 Q. B. 173.

(b) 7 Jur. N. S. 422.

other are prohibited from marrying, and is not confined to the particular case mentioned. Lord *Coke*, in his reading on stat. 32 *H. 8. c. 38.*, 2 *Inst.* 683, says: "These be the Levitical degrees, which extend as well to the woman as to the man. And herein note, that albeit the marriage of the nephew cum amita et matertera is forbidden by the said 18th chapter of *Leviticus*, and by express words the marriage of the uncle with the niece is not thereby prohibited, yet is the same prohibited, Quia eandem habent rationem propinquitatis cum eis qui nominatim prohibentur, et sic de similibus." And in *Ellerton v. Gastrell* (a), where the marriage was with the first wife's mother's sister, it is said: "And in this manner of computation all marriages of collaterals in the third degree are unlawful—and all marriages in the fourth degree are lawful. . . . Thus the marriage with the wife's sister's daughter is incestuous, which is in the same degree with this marriage: *Moore*, 907, *Cro. El.* 228, 4 *Leon.* 16, *Man's Case*." According to this construction of the statute, it contains a prohibition of the marriage of a man with his wife's niece. Moreover the Ecclesiastical Court has decided that such a marriage as this is void; and the Judges of the common law Courts have not interfered down to the passing of stat. 5 & 6 *W. 4. c. 54.* The cases are all referred to in the arguments in *Regina v. St. Giles* (b). In *Rennington v.* ———, *E. 16 Jac.* 1., cited in *Howard v. Bartlett* (c), though it was held that the widow, who was

1861.

The QUEEN
v.
Inhabitants of
BRIGHTON.

(a) 1 *Com.* 318. *S. C. nom. Butler v. Gastrill*, *Gillb. Ca. Eq.* 156. 158. *S. C. nom. Butler v. Gastrell*, *Bunb.* 145.

(b) 11 *Q. B.* 173.

(c) *Hob.* 181, 5th ed. *S. C. Rennington v. Cole*, *Noy*, 29; *Butl. Co. Litt.* 235 a., note 1.

1861.

The QUEEN
v.
Inhabitants of
BRIGHTON.

niece to the former wife of her deceased husband, was entitled to her widow's estate in copyhold land according to the custom of the manor, inasmuch as she was never during the life of her husband divorced, it is added "though there were cause." [*Blackburn J. Wortley v. Watkinson* (a), except as reported in *Keble*, is against the marriage.] That case is first mentioned, nom. *Worthy v. Buxton* (b), upon an application in *Hil. 27 Car. 2.* 1675, for a rule nisi for a prohibition to the Court of *York* in a suit for dissolving a marriage between one *Stephenson* and the daughter of his first wife's sister, which was granted *T. 28 Car. 2.* (c). The plaintiff was directed to declare in prohibition, and the argument on the demurrer was in *T. 30 Car. 2.* (d). Ultimately a consultation was awarded, and therefore the words "and per curiam Prohibition," in 3 *Keble*. 661, mean that the plaintiff was to declare in prohibition for the purpose of a solemn argument. The same course was followed in *Snowling v. Nursey* (e), in which the question was several times argued. In *Clement v. Beard* (f), which was an application for prohibition of a suit in the Ecclesiastical Court for marrying the wife's sister's daughter, *Holt C. J.* said: "Now for your case, it is certainly within the degrees of *affinity*; and in the same degree of *consanguinity* there would be no doubt of it; for a man cannot marry his own sister's daughter. I thought this case had been settled; there is a case against you in point." In *Denny*

(a) 3 *Keble*. 620, 660 *T. Jones*, 118: 2 *Lev.* 254; 2 *Show.* 70.

(b) 3 *Keble*. 620.

(c) 3 *Keble*. 660.

(d) *T. Jones*, 118, and 2 *Show.* 70. In 2 *Lev.* 254, the date is *T. 31 Car. 2.*

(e) 2 *Lutw.* 1075.

(f) 5 *Mod.* 448, 449, cited in 1 *Com.* 320.

v. *Ashwell* (a), it is said: "A prohibition was denied to a suit in the spiritual Court for marrying his wife's sister's daughter, though cases were quoted where such a marriage has been held legal; *Moore*, 907; 2 *Keb.* 551; 1 *Sid.* 434; 1 *Mod.* 25; 2 *Lev.* 254; contra 2 *Ventr.* 12." But, on looking at the cases referred to, after several arguments prohibition was refused, and a consultation was granted; and this was the result in *Mann's Case* (b), as is said by *Vaughan* C. J. in *Hill* v. *Good* (c), and in *Harrison* v. *Dr. Burwell* (d); though, also according to *Vaughan* C. J. (p. 248, 322), the record of *Man's Case* could not be found. All the authorities were considered and affirmed, and the same decision given, in *Ellerton* v. *Gastrell* (e); and in 5 *Bac. Abr.*, 7th ed., *Marriage and Divorce* (A.), 294, it is assumed to be undoubted law; and, since that case, the question has not been raised. [They also cited 2 *Stephen's Commentaries*, 256, 4th ed.] The opinion of the Ecclesiastical Courts is recognised by Lord *Denman* C. J., in *Regina* v. *Chadwick* (f), as determining what marriages are prohibited by God's law; and that opinion appears from the cases cited, in all which the Ecclesiastical Court was proceeding to dissolve the marriage. Those Courts have always obeyed the injunctions of the Canons, and Canon 99 of the Canons of 1603 incorporates *Abp. Parker's Table* (g) in the reign of *Elizabeth*, in which marriages between a woman and her mother's sister's hus-

1861.

The QUEEN
v.
Inhabitants of
BRIGHTON.

(a) 1 *Str.* 53.(b) *Moore*, 907; 4 *Leon.* 16; more fully reported in *Cro. El.* 228.(c) *Vaugh.* 302. 321, 322.(d) *Vaugh.* 206. 247, 248.(e) 1 *Com.* 318. *S. C. nom. Butler* v. *Gastrill*, *Gillb. Ca. Eq.* 156. *S. C. nom. Butler* v. *Gastrell*, *Bunb.* 145.(f) 11 *Q. B.* 205. 231, 232.(g) 2 *Burn, E. L.* 446, 9th ed., by *Phillimore*.

1861.

The QUEEN
v.
Inhabitants of
BRIGHTON.

band, and between a woman and her husband's brother's son, are expressly mentioned as unlawful (a).

Cur. adv. vult.

June 26. The judgment of the Court was delivered by

COCKBURN C. J. My brothers reserved their judgment in this case, not on account of any doubt as to what that judgment should be, but in consequence of my unavoidable absence during part of the argument, and from a wish to ascertain whether my opinion would coincide with theirs. It is a case of settlement, which depends upon the question, whether a marriage with the niece of a deceased wife is or is not valid; and I now state, as the united opinion of the Court, that such a marriage is not lawful. In *Ellerton v. Gastrell* (b), where all the authorities are collected, on a review of many cases all leading to the same result, the Court was of opinion that a marriage with the daughter of a wife's sister was within the degrees prohibited by the *Levitical* law. Then we have stat. 5 & 6 W. 4. c. 54., which, by section 2, enacts "that all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be" not merely voidable, but "absolutely null and void to all intents and purposes whatsoever." We must consider that Act of Parliament to have been passed with reference to the known and ascertained state of the law in the Ecclesiastical Courts, and as laid down by the Court in *Ellerton v. Gastrell*, and consequently we have that law sanctioned and confirmed by an Act of Parliament. We there-

(a) See 2 Burn, *E. L.* 444, 445, 9th ed., by Phillimore.

(b) 1 Com. 318. *S. C. nom. Butler v. Gastrell*, *Gilb. Ca. Eq.* 156. *S. C. nom. Butler v. Gastrell*, *Bunb.* 145.

fore entertain no doubt, upon the authority of that case and upon stat. 5 & 6 W. 4. c. 54., that this marriage is void.

1861.

The QUEEN
v.
Inhabitants of
BRIGHTON.

Another point was made,—whether the illegitimacy of the sister of the deceased wife makes any difference. We stopped counsel in the argument of that point; and I only advert to it now, because in a newspaper report of this case it is said that the Court took time to consider it. That is clearly an error, and contrary to what fell from the Court. For I then stated (somewhat emphatically perhaps), that it would be a public scandal to say that there must be legal as well as natural consanguinity, to bar such a marriage. If this matter was not perfectly plain on the face of it, we have ample authority for so holding. In *Haines v. Jeffreys* (a), the Court with equal determination repudiated the notion that a bastard should not be accounted within the prohibited degrees. I should not have thought it necessary to repeat this, but for the mistake in the public prints, to which I have referred, in a matter of great public importance.

The order of Sessions must, therefore, be quashed.

Order of Sessions quashed.

(a) 1 Com. 2; S. C. nom. *Hains v. Jeffell*, 1 *Ld. Raym.* 68; nom. *Haines v. Jescott*, 5 *Mod.* 168; nom. *Hains v. Jescott*, *Comb.* 356.

1861.

Wednesday,
June 28th.

The QUEEN against JOHN BARFF CHARLESWORTH.

*Criminal
trial.
Discharge of
jury without
giving verdict.
Collusion.
Double plead-
ing.*

1. Where, in a case of misdemeanor, the jury are improperly, and against the will of the defendant, discharged by the Judge from giving a verdict after the trial has begun, this is not equivalent to an acquittal, nor does it entitle the defendant to judgment *quod eat sine die*.

2. *Quære*, whether the same holds in treason and felony?

3. *Semble*, that in a criminal case a Judge is not justified in discharging the jury from giving a verdict because material evidence on the part of the Crown is not forthcoming, the absence of which will be productive of a defeat of justice; but

4. *Quære*, whether he may not do so if the absence of the evidence is occasioned by collusion between a witness and the accused?

5. Information by *The Attorney General* for bribery at an election of a member of Parliament. Plea, not guilty. At the trial, a material and necessary witness for the Crown refused to give evidence, and was committed for contempt; whereupon, at the application of the counsel for the Crown, the defendant objecting, the Judge discharged the jury from giving any verdict: *Quære*, whether he was right in so doing?

6. The Court in that case refused to allow the defendant to add a plea *puis darrein continuance*, stating the above facts: on the ground that this would be to allow double pleading; and also, as the facts would be set out on the record, the defendant could take advantage of them.

INFORMATION for bribery, filed by *The Attorney General*.

The first count charged that the defendant unlawfully and corruptly advanced and caused to be paid to one *José Louis Fernandes* the sum of 3750*l.*, with intent that it should be expended in bribery at the election of a member of Parliament for the borough of *Wakefield*, in *April*, 1859, contrary to stat. 17 & 18 *Vict. c. 102*. There were seven other counts charging the defendant with distinct acts of bribing voters.

Plea: Not guilty.

On the trial, before *Hill J.*, at the Spring Assizes for the county of *York*, in 1861, *J. L. Fernandes*, who had received a certificate from the Commissioners appointed under stat. 15 & 16 *Vict. c. 57.*, to examine into corrupt

practices at the election for the borough of *Wakefield* in 1859, was called as a witness for the prosecution. He refused to answer a certain material question put to him upon the ground that the certificate was not a sufficient protection. The learned Judge was of opinion that, by sect. 10, the certificate freed him from all prosecutions for any corrupt practice at the election, and therefore he was bound to answer the question. When the witness still refused to answer, the learned Judge adjudged him to be guilty of a contempt of the Court, and sentenced him to be imprisoned for that contempt for six calendar months, to pay a fine of 500*l.*, and to be imprisoned until that fine was paid (*a*). The *Solicitor General*, who conducted the case for the Crown, then stated that it was impossible to proceed with the prosecution without the evidence of this witness, and asked the learned Judge to discharge the jury instead of directing a verdict of acquittal for want of evidence, and cited *Newton's Case* (*b*) and *The King v. Stokes* (*c*). For the defendant it was contended that the Judge had no discretionary power in the matter, and that, when a person was once placed on his trial, he had a right to be tried. The learned Judge, after consulting *Keating J.*, said that the conclusion at which he had arrived was to discharge the jury; that, if he had not the power to do so by law, the fact of the discharge, with the reason of

1861.

The QUEEN
v.
CHARLES-
WORTH.

(*a*) A habeas corpus was subsequently moved for in the Court of Exchequer, see 6 *H. & N.* 717, and in the Court of Common Pleas, see 10 *C. B. N. S.* 3, to discharge the witness from custody, and refused, on the ground that the Judges of assize are Judges of a superior Court, and have a jurisdiction to commit, which is not subject to be reviewed by the Court above.

(*b*) 13 *Q. B.* 716.

(*c*) 6 *C. & P.* 151.

1861.

 The QUEEN
 v.
 CHARLES-
 WORTH.

it, would appear on the record ; but that, if he had the power, he ought to exercise it where a witness had wilfully tampered with the ends of justice. The jury were discharged accordingly.

In *Trinity Term* (*May 30*),

Sir *F. Kelly*, on behalf of the defendant, moved for leave to file a plea in the nature of a plea puis darrein continuance, the plea of not guilty remaining on the record. The plea will raise the question whether the defendant, having been once put on his trial upon this information, can again be tried upon it. The discharge of the jury in this case was not a matter in the discretion of the Judge, and therefore it may be pleaded as a bar to the information. Unless this plea is allowed, the defendant must be exposed to the anxiety and expence of another trial before he will be able to raise the question by motion in arrest of judgment, or by bringing a writ of error. The defendant cannot compel the Crown to make up the postea. [He cited *Conway and Lynch v. The Queen* (a), *The Queen v. Newton* (b) and *The Queen v. Davison* (c).] If the plea ought not to be allowed, the *Attorney General* can move to take it off the file.

COCKBURN C. J. Where a defendant alleges that some matters have occurred since he pleaded which exempt him from further liability upon the charge made against him on the indictment or information, he has a right to plead puis darrein continuance. Upon this ground the application ought to be granted ; and the

(a) 7 *Irish Law Rep.* 149.

(b) 3 C. & Kir. 85, 87, 88.

(c) 2 F. & F. 250.

Attorney General can, if he pleases, move to take the plea off the file, or demur to it.

1861.

THE QUEEN
v.
CHARLES-
WORTH.

WIGHTMAN and BLACKBURN JJ. concurred.

Application granted.

The plea was as follows:—

“ And now (that is to say) on the 22d of *May* in this same term, before our said lady the Queen at *Westminster*, cometh the said *John Barff Charlesworth*, by the said *Charles Fiddey* his attorney, and saith that the said *Attorney General* for our said lady the Queen ought not further to prosecute the above mentioned information against him the said *J. B. Charlesworth*, or to proceed to the trial of the issue above joined, because he says that heretofore (to wit) on the 7th day of *March* A. D. 1861, at *York*, in the county of *York*, at the Assizes then and there holden in and for the said county, before the Honorable Sir *Hugh Hill*, Knight, and the Honorable Sir *Henry Singer Keating*, Knight, Justices of our lady the Queen, duly assigned to take the Assizes in and for the said county, the jurors of the jury aforesaid being then and there called, did then and there come; thereupon [names of jurors] twelve of the jurors last aforesaid were then and there duly called, and did then and there answer to their names respectively, and were then and there duly sworn and empannelled to try the issue above knit and joined between our Sovereign lady the Queen and the said *J. B. Charlesworth*. And the jurors so sworn and empannelled were then and there duly charged with the said *J. B. Charlesworth*, who was then and there duly given in

1861.
The QUEEN
v.
CHARLES-
WORTH.

charge to the last mentioned jurors so sworn and empannelled as last aforesaid. And Sir *William Atherton*, Knight, Her Majesty's Solicitor General, of counsel for and on behalf of our said lady the Queen, who then and there prosecuted for our said lady the Queen in that behalf, did then and there produce divers (to wit eight) witnesses for and on behalf of our said lady the Queen, who were then and there duly sworn, and then and there gave evidence to the said Court and the said jury so sworn and empannelled and charged with *J. B. Charlesworth* as aforesaid touching the said supposed misdemeanours above laid to his charge. And the said *J. B. Charlesworth* further says that, after the said jurors were so charged with the said *J. B. Charlesworth*, and during the trial of the said issue, *José Louis Fernandes*, one of the said witnesses for and on behalf of our said lady the Queen, refused to answer a certain question put to him by the counsel for and on behalf of our said lady the Queen, whereupon the said Sir *Hugh Hill*, one of the said Justices, having delivered his opinion that the said *J. L. Fernandes* was bound by law to answer the said question, and he still refusing to answer the same, the counsel for our said lady the Queen declined further to proceed with the trial of the said issue, and called upon the said Justice to discharge the said jurors from giving any verdict thereon, against which the said *J. B. Charlesworth*, by his counsel in that behalf, protested and objected, and requested the said Justice to proceed with the trial of the said issue, so that the jurors aforesaid might deliver their verdict thereon, which the said Justice refused to do, and thereupon the said Justice then and there, for the reason aforesaid, and for no other cause whatever, with-

out the consent and against the will of the said *J. B. Charlesworth*, discharged the said jurors of the said *J. B. Charlesworth*, and from declaring or giving their verdict on the said issue. And this the said *J. B. Charlesworth* is ready to verify, &c. Wherefore he prays judgment, and that he may be dismissed by the Court here of the premises in the said information mentioned, and be acquitted thereof, and go thereof without day, and that the same may not be further prosecuted against him the said *J. B. Charlesworth*," &c.

1861.

The QUEEN
v.
CHARLES-
WORTH.

Notice was given to the Crown Office, the Solicitor of the Treasury and the Associate to produce the record of the proceedings at the trial.

The Solicitor General (June 6th) obtained a rule calling upon the defendant to shew cause why the above plea pleaded by the defendant in bar of further proceedings should not be taken off the file.

Sir *F. Kelly*, *Bovill*, *Mellish*, and *Maule* shewed cause (June 10th).—The plea that the jury had been discharged from giving a verdict is a plea in bar of further proceedings; and the Crown ought either to have traversed the plea, or pleaded some other replication, or demurred to it; and then the question whether the plea was good might, if necessary, be taken to a Court of error. It is competent to a defendant in a criminal prosecution to raise the question of the lawfulness of the discharge of the jury by a plea *puis darrein continuance*. In *Conway and Lynch v. The Queen* (a), which was an indictment for felony, the jury at two assizes not

(a) 7 *Irish Law Rep.* 149. See an abstract of the case in note to *Newton's Case*, 13 *Q. B.* 735.

1861.

The QUEEN
v.
CHARLES-
WORTH.

agreeing were discharged ; at the third assizes two pleas setting forth the facts and the discharge of the jury at the first and second assizes were pleaded ; no objection was taken by the counsel for the Crown to the pleas ; but they replied, adding some facts to those stated in the pleas, and the prisoners demurred. The pleas, which were in the nature of pleas puis darrein continuance remained on the record with the plea of not guilty. In this case the defendant has put in the plea now instead of waiting until the information should be taken down again to the assizes. [*Blackburn J.* In *Conway and Lynch v. The Queen* (a) the counsel for the Crown waived any objections to want of form in the pleas, and *Crampton J.*, p. 165, objected that, "after pleading not guilty to the indictment, and putting themselves for trial upon a jury, the prisoners are allowed not only to plead in bar of further proceedings, but to plead *double matter*," observing that if the case proceeded to the House of Lords it would not pass without observation.] *Crampton J.* only objected that the pleas were double in pleading a discharge of the jury at the first assizes and a discharge of the jury at the second assizes. Also the counsel for the Crown merely waived any objection to the form of the pleas : and their waiver could not give jurisdiction to the Court to entertain a question not properly raised on the record. There is no difference between this plea and the plea in *Conway and Lynch v. The Queen* (a), except that this plea concludes with a prayer of judgment that the defendant may "be acquitted" of the premises in the information, that is, by the Court, "and go thereof without day, and that the same may not be further prosecuted against him ;" whereas the plea in *Conway and Lynch v. The*

(a) 7 *Irish Law Rep.* 149.

Queen, p. 150, concludes with a prayer of judgment simply that the indictment "may not be further prosecuted" against the defendant. [*Crompton J. Perrin J.* considers that an entry of the facts ought to have been made by the Clerk of the Crown when the jury were discharged, "which if he had done," he says (p. 160), "there would have been no need of a plea on the part of the prisoner:" that does away with the difference of the two pleas. *The Solicitor General*. This being a record of this Court, an entry will be made of the proceedings; at present only minutes are prepared from which the record will be made up hereafter.] The defendant is willing to amend the plea according to the facts at the trial. The statement on the record ought to contain an entry of the discharge of the jury and the reason for that discharge. In *The Queen v. Newton* (a) *Rolfe B.* said that such a plea as this would be proper even if it stated nothing new. [*Crompton J.* There is authority that a judgment on a plea of *auterfois acquit* would be final, and then the trial would be lost.] This plea is essentially different from a plea of *auter fois acquit*. [*Cockburn C. J.* In criminal proceedings a defendant cannot plead double (b), and therefore, if instead of trying the defendant on this information a new information were filed, he could not plead a plea of not guilty and this plea in bar.] There is authority that if the indictment be for felony or treason the defendant, besides the plea of *auterfois acquit*, should also plead over to the felony; *Archb. Plead. and Ev. in Crim. Cas.*, 119, 12th ed.; where *Vandercomb's Case* (c)

1861.

THE QUEEN
v.
CHARLES-
WORTH.

(a) 3 *Car. & K.* 85. 88. See *Newton's Case*, 13 *Q. B.* 734, 735.

(b) See 1 *Chitt. Crim. Law*, 434, 2d ed.

(c) 2 *Leach, C. C.* 708, 4th ed.

1861.
 The QUEEN
 v.
 CHARLES-
 WORTH.

is cited, in which there being a plea of *auterfois acquit* to an indictment for burglary, it is stated, p. 712, note (a), "the plea, as it was originally delivered to the Court, did not *plead over*, but the Court conceiving this to be absolutely necessary, the prisoners pleaded over to the burglary, 'Not Guilty,' and it was added to the plea in *parchment*." [Crompton J. In *The Queen v. Goddard* (a) Holt C. J. said "a man could not plead over in any case, but in treason or felony, and not in case of a *mis-demeanour*:" if the defendant was indicted anew he could not plead both *auterfois acquit* and not guilty. Suppose the Crown traverses this plea and issue is taken thereon, is the record to be sent down with both pleas upon it?] The issue raised by this plea will be tried first, and if found in favour of the defendant he will have judgment on it, and the issue upon the plea of not guilty will not be tried. [Crompton J. The judgment must be given by this Court. If the Crown should demur, still the Crown has a right to take the case down to trial for disposing of the issue in fact. *Wightman* J. If the information goes down to trial again and the defendant is convicted, he may move in arrest of judgment.] But the Judge might pronounce sentence at once, as Lord Campbell did in *The Queen v. Humphry Brown and others* (*The Case of the Royal British Bank* (b)). [Crompton J. In that case there was no question of law; besides, whether a legal judgment could be entered would be a question for this Court.] But it could not come before the Court until a part of

(a) 2 *Ld. Raym.* 920. 922.

(b) At the Sittings at *Guildhall* after *Hil.* Term, 1857. See Report of the Trial by Mr. Cook Evans. In the following *Easter* Term, application for a new trial was made on behalf of some of the defendants, but refused.

the punishment had been endured. *The Queen v. Davison* (a) is an instance of an indictment for misdemeanor, in which the jury not being able to agree were discharged, and the indictment having been removed into the Central Criminal Court by certiorari, a similar plea to this was pleaded, the form and language of which shews that it was pleaded to the original indictment. [*Crompton J.* On the removal of an indictment by certiorari the proceedings begin afresh. *Blackburn J.* The plea in *The Queen v. Davison* (a) was not in the nature of a plea puis darrein continuance. *Crompton J.* Unfortunately the report does not give the conclusion of the plea. The three Judges (*Pollock C. B.*, *Martin B.*, and *Hill J.*) gave no opinion that the discharge of the jury might be taken advantage of by plea: they held the plea to be bad because it pleaded matter which was for the discretion of the Judge. This is matter for suggestion on the record rather than of plea; it concerns the exercise of the power of a Judge, which in former times was abused, as in *Whitebread and Fenwick's Case* (b). *Wightman J.* Assuming that the plea states no more than will appear on the record, we ought not to allow the defendant to plead so that the facts shall twice appear on the record. If the plea and the entry on the record differ, a summons might be taken out before my brother *Hill* to amend the record.] The record is not in the power of the defendant. [*Wightman J.* The officer may be compelled to make the proper entry, by taking out a summons before a Judge.

1861.

THE QUEEN
V.
CHARLES-
WORTH.

(a) 2 F. & F. 250.

(b) See *The King v. Ireland and others*, 7 How. St. Tr. 79. 120, and *The King v. Whitebread and others*, *Id.* 311. 315—317, and remarks on the illegality of that proceeding, *Id.* 497, note.

1861.

The QUEEN
v.
CHARLES-
WORTH.

Crompton J. Suppose the jury found an inartificial verdict.] It would be necessary to put it on the record in order that the defendant might have the judgment of the Court on the question of law, without going down to trial. [*Crompton J.* I doubt the power of the Court to prevent the record going down to trial for disposing of an issue of fact.] What becomes of the plea of not guilty? If the defendant has judgment on this plea, every other issue is immaterial, and the cause is at an end; and therefore it is not necessary that the other issue should be tried. Suppose, while the information was being tried, the Queen's pardon came down to the assizes. [*Blackburn J.* In that case must not the plea of not guilty be withdrawn as a preliminary step to pleading the pardon?] In 2 *Hawk. P. C.*, by *Curwood*, p. 551, b. 2, c. 37, s. 67, "Of Pardon," it is said, "Fourthly, That no such pardon can be pleaded together with, or after the general issue, unless it be of a date subsequent to the time of the pleading such issue, because otherwise it is waived by it." [*Cockburn C. J.* When the defendant pleads a pardon, must he not waive the general issue?] There is no authority for that. [*Cockburn C. J.* The pardon assumes the offence of the party]. Whenever anything occurs subsequently to the jury being sworn, which disentitles the Crown to proceed further, the defendant ought to be allowed to put it on the record by way of plea. [*Cockburn C. J.* Probably the *Solicitor General* would not offer any resistance to an entry of the facts stated in the plea being made on the record, and then the defendant might pray judgment quod eat sine die. *The Solicitor General.* The entry would contain in substance the facts stated in the plea, with the addition of some

other particulars.] The objection is that the Court has no power to put the defendant upon his trial a second time. [*Cockburn* C. J. We must ascertain the effect of this plea on the plea of not guilty, otherwise there may be double pleading, which is not allowable. If the facts are put on the record by way of suggestion they are traversable. *Crompton* J. The Court will not quash an indictment unless it is perfectly clear that the indictment is insufficient, but leaves it on the record, so that the objection to it may be taken in arrest of judgment. And a plea that the defendant ought to be acquitted is practically a matter in arrest of judgment.] Suppose a plea that the jury gave a verdict of acquittal, and thereupon the Judge directed that the jury should be discharged. Or suppose an issue as to error in fact, there would be a venire to try that issue, in order to inform the conscience of the Court, and to enable it to determine whether it would send the case down for trial.

1861.

THE QUEEN
V.
CHARLES-
WORTH.

The Solicitor General, Overend, Monk, Cleasby and Welsby, in support of the rule, were not called upon.

COCKBURN C. J. I am of opinion that the rule ought to be made absolute. This plea cannot be allowed to remain on the file: as the record now stands, it is open to the objection of shewing what amounts to a double plea; and it is laid down by authority that in an indictment for a misdemeanour there may not be double pleas. The proper mode of raising the question whether the defendant may be put upon his trial again upon this information will be, by the defendant taking any objection which he is entitled to by law, when the facts are entered on the record. *The Solicitor General* makes no

1861.

The QUEEN
v.
CHARLES-
WORTH.

objection to adopt the facts as stated in the plea, with the addition of some particulars. When the facts appear upon the record, there will be a further objection to the plea that it states the same facts as are already stated on the record. Therefore, this being a matter of discretion with the Court, I am of opinion that we ought not to allow this plea.

WIGHTMAN J. I am of the same opinion, upon the ground that if there shall be an entry on the record of the facts as stated in this plea, it will be inconvenient, not improper, that the same matter should appear twice on the record. Whatever may be the mode of taking advantage of the discharge of the jury, the defendant will not be prejudiced by putting the matter on the record, except in this, that he may be put to the trouble and expense of another trial. I do not know how this may be: certain I am that there is no instance in which there has been such a plea except *Conway and Lynn v. The Queen* (a), and *The Queen v. Davison* (b); in the latter case it does not appear whether the prisoner was tried upon the same or another indictment.

CROMPTON J. We must consider this application as if we should do an application to put this plea on the record; because the plea was put on the record by application ex parte. It is clear that it cannot be allowed without the plea of not guilty being withdrawn. This is not matter of plea, but matter of error. It is an objection to what has occurred at the trial, as when there is a wrong entry on the record as to the jury, when the jury have given an imperfect verdict: in the

(a) 7 *Irish Law Rep.* 149.(b) 2 *F. & F.* 250.

cases the proper course is to get the facts entered upon the record ; and when the defendant is brought up for judgment then is the time for him to take objection. Therefore I agree that the plea ought to be expunged.

1861.

THE QUEEN
V.
CHARLES-
WORTH.

BLACKBURN J. I am of the same opinion. It is sufficient to say that, while the plea of not guilty stands on the record, the pleading this plea is pleading double, and therefore it ought to be expunged. The true state of things as they occurred at the trial ought to be entered on the record ; and I think no advantage can be taken of that entry until the plea of not guilty has been disposed of.

Rule absolute.

Sir *F. Kelly* (June 11th) applied to the Court to order that a statement of the facts should be entered on the record immediately.

The following entry on the record was accordingly made : " On which day, before our lady the Queen, at *Westminster*, come as well the said *Attorney General* of our lady the Queen as the said *J. B. Charlesworth* by his attorney aforesaid. And the Justices of our lady the Queen, of Assize, before whom, &c., have sent here their record before them had in these words, to wit, ' Afterwards, at the day and place within contained before the Honorable Sir *Hugh Hill*, Knight, one of the Justices of our Lady the Queen, before the Queen herself, and the Honorable Sir *Henry Singer Keating*, one of the Justices of our lady the Queen, of the Bench of Justices of our Lady the Queen, assigned to take the Assizes in and for the county of *York*, come as well the said *Attorney General* of our Lady the Queen as the said *J. B. Charles-*

1861.

The QUEEN
v.
CHARLES-
WORTH.

worth by his attorney aforesaid. And the jurors of jury, whereof mention is within made, being called wise, come, who to say the truth of the matters w contained were elected, tried and sworn. And a wards, at the Assizes aforesaid, in the county afore the said jury, so sworn as aforesaid, are then and t duly charged with the said *J. B. Charlesworth*, and the said *J. B. Charlesworth* is then and there duly g in charge to the said jurors so sworn as aforesaid, thereupon public proclamation is made there in C for our said Lady the Queen, that if there be any who will inform the aforesaid Justices of Assize, Queen's Attorney General, the Queen's Serjeant at or the jurors of the jury aforesaid concerning the ters within contained, he should come forth and heard. Whereupon Sir *William Atherton*, Knight, S tor General, offereth himself on behalf of our said the Queen to do this. Whereupon the Court here ceedeth to the taking of the inquest aforesaid by jurors aforesaid, now here appearing for the pu aforesaid, and during the taking of the inquest afor *José Louis Fernandes*, a witness produced before the jurors for and behalf of our said Lady the Queen said *J. L. Fernandes* then being a material and n sary witness on behalf of our said Lady the Queen, w refused to answer a certain question put to him b counsel for and on behalf of our said Lady the Q Whereupon the said Sir *Hugh Hill*, one of the Justices, having delivered his opinion that the said *Fernandes* is bound by law to answer the said que and he the said *J. L. Fernandes* still refusing to an the same, the said Sir *Hugh Hill* adjudges that the *J. L. Fernandes* is by reason thereof guilty of a

tempt of Court here. And thereupon the counsel for our said Lady the Queen decline to proceed further with the taking of the inquest aforesaid, and call upon the said Justice to discharge the said jurors from giving any verdict thereon, against which the said *J. B. Charlesworth* by his counsel in that behalf objects and protests, and requires the said Justice to proceed with the taking of the said inquest, so that the jurors aforesaid may deliver their verdict thereon, which the said Justice refuses to do; and thereupon the said Justice then and there, for the reasons aforesaid, and for no other cause whatever, and without the consent and against the will of the said *J. B. Charlesworth*, and of his said counsel, orders that the said jurors shall be, and the jurors by the Justice aforesaid, from giving any verdict of and upon the premises are, discharged. Therefore the jury aforesaid are further put in respite before our Lady the Queen, at *Westminster*, until, &c."

1861.

The QUEEN
V.
CHARLES-
WORTH.

Sir *F. Kelly* (*June 12th*) obtained a rule, of which notice was given to the Solicitor of the Treasury, by which, "upon reading the record in this prosecution," it was "ordered that cause be shewn instanter (a) why judgment should not be entered for the defendant, that he be dismissed and discharged of and from the premises in the information in this prosecution specified and charged upon him, and that he depart without day in that behalf; and why the award of jury process and all

(a) *June 12th* being the last day of *Trinity* Term, the rule was made returnable instanter, in order that it might be a matter "pending in the Court," and as such be disposed of at the Sittings in Banc after Term, avoiding the question whether the Court had power to make the rule returnable at those sittings by consent.

1861.

The QUEEN
v.
CHARLES-
WORTH.

other proceedings in this prosecution should not be stayed."

This rule was argued at the Sittings in Banc after Term (*June* 22nd, 23rd, 24th and 25th).

The Solicitor General, Overend, Cleasby and Welsby shewed cause.—First: in the present state of the record and of the proceedings, the judgment prayed for, which would amount to a judgment of acquittal, cannot be entered either according to the principles of pleading or according to precedent. The issue on the plea of not guilty remains to be disposed of. A final judgment cannot be given until all the issues in law and in fact joined on the record have been disposed of, which means that there must be a judgment or a verdict and judgment upon each; *Beckham v. Knight* (a), *Carden v. The General Cemetery Company* (b), *Hinton v. Acraman* (c). [*Blackburn J.* If the other side are right, the issue on the plea of not guilty has been disposed of. *Cockburn C. J.* The reason for not taking the record into a Court of error until all the issues are disposed of does not apply if the issue on the plea of not guilty is immaterial.] Whether this application is granted or refused, the case will not be ripe for a final judgment; and a writ of error can be brought only upon a final judgment; *Metcalf's Case* (d). This is in the nature of an application to stay proceedings, and the refusal of such an application could not be reviewed by writ of error. [*Crompton J.* If we refuse a venire de novo, will there not be a judgment on which a writ of error will lie? The refusal would appear on

(a) 7 Dowl. P. C. 409.

(b) *Id.* 425.

(c) 3 C. B. 737.

(d) 11 Co. 38.

the record ; and if we are wrong, the Court of error would award a venire de novo. The House of Lords have held that a writ of error will lie on an award of a venire de novo (a). *Blackburn J.* The judgment of the Exchequer Chamber in *Campbell v. The Queen* (b), shews that the Court of error might order the Court below to award a venire de novo.] Admitting that a wrong award of a venire de novo is ground of error (c), there would be no award of a venire de novo in this case ; upon the writ being resealed, the same jury as that which was discharged would be summoned by the sheriff without the intervention of the Court by distringas out of the Crown Office. [They referred to the entry in *Minter ats. Brett* (d), and in *The Queen v. Watson* (e), where a juror was withdrawn on the first trial.] In this case, the special jury was struck according to the practice existing before The Common Law Procedure Act, 15 & 16 *Vict. c. 76.*, in pursuance of the proviso in sect. 108 ; but a fresh rule for a special jury would not be necessary. [*Wightman J.* The Master says that a special jury would in this case be summoned by a venire de novo in the old way.] There is no instance in the Crown Office of a writ of error upon a judgment quod eat sine die. And if the judgment quod eat sine die discharges the defendant from the offence, there could not be new process to vex him for the same offence. Further, there is no precedent for such a judgment as eat sine die at this stage of the proceedings. The only mode in

1861.

The QUEEN
v.
CHARLES-
WORTH.

(a) See *M'Mahon v. Sir T. B. Leonard*, 5 *H. L. Ca.* 931.

(b) 11 *Q. B.* 799. 814.

(c) See The Common Law Procedure Act, 1854, 17 & 18 *Vict. c. 125.*
s. 43.

(d) *Lill. Entr.* 489.

(e) 2 *Ld. Raym.* 856.

1861.

The QUEEN
v.
CHARLES-
WORTH.

which an objection can be taken to matter on the record earlier than the time for moving in arrest of judgment is by demurrer. The objection which is made the ground of this application will be open to the defendant on motion in arrest of judgment and on a writ of error upon final judgment. In *Kinloch's Case* (a), the issue on the plea of not guilty was first tried, and, the prisoners being found guilty, their counsel moved in arrest of judgment. [*Wightman J.* In *The King v. Wade* (b), the Judges thought that the discharge of the jury was improper, and that judgment of acquittal should have been given, but there they leave the matter; *Crompton J.* In *King v. The Queen* (c), the reason for ordering a second trial was entered upon the record.] The course taken by the defendant in this case was not taken in *Newton's Case* (d) nor in *The Queen v. Davison* (e), which was an indictment for a misdemeanor, nor in *Conway and Lynch v. The Queen* (f), which was an indictment for a felony. The proceedings in the latter case were irregular, but the consent of the *Attorney General* cured the irregularity. [*Crompton J.* In *Newton's Case* (g) the prisoner had been tried before commissioners of oyer and terminer; and in *The Queen v. Davison* (h) the prisoner had been tried at the Quarter Sessions. This question arises on matter appearing on the record in the nature of a *postea*, and I do not see any reason why it should not be raised at that stage of the proceedings.]

(a) *Foster*, 16. 22. The case is also reported in 18 *How. St. Tr.* 395.

(b) 1 *Moo. C. C.* 86.

(c) 14 *Q. B.* 31.

(d) 13 *Q. B.* 716.

(e) 2 *F. & F.* 250.

(f) 7 *Irish Law Rep.* 149.

(g) 13 *Q. B.* 716.

(h) 2 *F. & F.* 250.

Secondly : at no stage of the proceedings, and in no form would the defendant be entitled to have the judgment prayed for entered on the record. The Judge had power to discharge the jury, and if he had that power it must be exercised in his discretion, and his discretion is not subject to be reviewed any more than the ruling of a Judge in criminal cases as to the admissibility of evidence or his mode of leaving a case to the jury. The authorities and cases are most of them cited or referred to in the argument of Sir John Jervis, Attorney General, in *Newton's Case* (a), p. 717-725. [They referred to *Co. Litt.* 227 b.; *Doctor and Student*, Dial. 2, ch. 52; 2 *Hale P. C.* 294, 295, c. 41; *Kinloch's Case* (b); *Ferrar's Case* (c).] The position in *Co. Litt.* 227 b. that "a jury sworn and charged in case of life or member, cannot be discharged by the Court or any other, but they ought to give a verdict," is too large, as appears from subsequent decisions. The rule laid down by *Blackstone*, 4 *Comm.* p. 360, is that "the jury cannot be discharged (unless in cases of evident necessity) till they have given in their verdict." And the word necessity is not confined to physical necessity. [They cited the observations of *Coleridge* and *Erle JJ.* in *Newton's Case* (d).] To constitute the necessity it is enough that there are special circumstances, caused by the misconduct of some person concerned in the trial, owing to which, unless the jury are discharged, there will be a failure of justice. In 2 *Hawk. P. C.*, by *Curwood*, 619, ch. 47, s. 1, it is said "that it seems to have been anciently an uncontroverted rule, and hath been allowed, even by those of the contrary opinion, to have been the general tradition of the law, that a jury

1861.

The QUEEN
v.
CHARLES-
WORTH.

(a) 13 Q. B. 716.

(b) *Fost.* 16, 22.(c) *T. Raym.* 84.

(d) 13 Q. B. 733, 734.

1861.

The QUEEN
v.
CHARLES-
WORTH.

sworn and charged in a capital case, cannot be discharged (without the prisoner's consent) till they have given a verdict;" and then it is added, note (c), "and the prisoner is holden by *Coke* as to larceny, and any case of murder." 3 *Inst.* 110, *Co. Litt.* 227 b. But as to cases of an inferior nature, the contrary hath been adjudged. *Raym.* 84. *Vide* 1 *Ventr.* 69." [*Wightman J.* "Any offence which a member" embraces those misdemeanors for which a prisoner might have been condemned to stand in the pillory. This is not so much matter of law as of practice; *Crawford J.*, in *Conway and Lynch v. The Queen* (a). In *Kilgobbin's Case* (b), *Foster J.* said, "I take it to be one of the most difficult questions, which are not capable of being determined by any general rule that hath hitherto been laid down, and which possibly ever may be. For I think it is impossible to fix upon any single rule which can be made to govern the infinite variety of cases which may come under the consideration of a general question without manifest absurdity; and in many instances without the highest injustice." In 2 *Halst.* 295, c. 41. it is said, "Nothing is more ordinary than for a prisoner, after the jury sworn, and charged with a prisoner, and evidence given, yet if it appear to the Court, that the evidence of the evidence is kept back, or taken off" (that is, that there is collusion with the prisoner), "or that there may be a fuller discovery, "and the offence notorious * * * that the evidence, though not sufficient to convict a prisoner, yet gives the Court a great and strong presumption of his guilt, the Court may discharge the jury from the prisoner, and remit him to the gaol for further evidence." *Ferrar's Case* (c) goes farther than is necessary for the present case. [*Cockburn C. J.* And farther than the modern practice warrants.] One class of cases

(a) 7 *Irish Law Rep.* 149. 172.(b) *Foster*.(c) *T. Raym.* 84.

which, according to modern practice, judges have discharged the jury, is where the jury have been unable to agree, as in *The King v. Cobbett*, referred to in *Newton's Case* (a), or where a juror has fallen ill, as in *The King v. Edwards* (b), *The King v. Stevenson* (c) and *The King v. Scalbert* (d). [*Crompton J.* The exercise of the power in those cases is not disputed.] Another class of cases is where the jury has been tampered with, as in the case cited by Sir *John Strange* in *Fost.* 27, which was an indictment for murder, *Hil.* 8 *H.* 7, *Rot.* 3, and *The King v. Jane D—* (e). [*Wightman J.* The report in *Ventris* does not say what became of that case.] In *The King v. Stokes* (f) the jury was discharged, upon the application of the counsel of the prisoner, on the ground of the absence of a material witness; and if that was contrary to law it could not have been done even at the prisoner's request. Suppose a tumult in the Court and the jury were overawed, the exercise of this power would be necessary for the proper administration of justice. In this case the withholding of the evidence by the witness made it necessary that the jury should be discharged.

1861.

The QUEEN
v.
CHARLES-
WORTH.

Sir *F. Kelly*, *Mellish* and *Maule*, for the defendant. — [The Court desired counsel to argue the main question first.] The result of the authorities and precedents is that when the jury has been once charged with the accused, and sworn to pronounce a verdict on a criminal charge, they cannot lawfully be discharged until a verdict has been pronounced; except

(a) 13 *Q. B.* 723.(b) 4 *Taunt.* 309. *S. C.* 3 *Camp.* 207; *Russ. & Ry.* 224.(c) 2 *Leach. C. C.* 546.(d) *Id.* 620.(e) 1 *Ventr.* 69.(f) 6 *Car. & P.* 151.

1861.

The QUEEN
v.
CHARLES-
WORTH.

by reason of the act of the prisoner, as where it is a his instance or for his benefit, or in case of an insur mountable necessity. And in this rule the term "neces sity" has a definite meaning: it means a state of thing in which it is manifest to the presiding Judge that legal verdict has become impossible, as by reason of the death or illness of a jurymen amounting to his life being in danger, or rendering him physically incapable of deli berating and concurring in a verdict, or by reason of a permanent and irreconcilable disagreement among the jurors, or by reason of the illness or incapacity of the Judge, or the illness of the prisoner. In these cases it is not a matter of discretion in the Judge; though he must determine when the circumstances constitute a necessity for discharging the jury, and from his judg ment upon that matter there is no appeal. In the rule as laid down by Lord Coke in *Co. Litt.* 227 b. referring to 21 *Ed.* 3, 18., and in 3 *Inst.* 110. and by Lord Holt in *The King v. Perkins*, mentioned in *Carthew* (a), there must be an implied exception of cases of necessity; such as are suggested in *Doctor and Student*, Dial. 2, ch. 52, where the law is assumed to be as laid down by Lord Coke, viz.: "they (the jury) will in no wise agree in their verdict and "if one of the jury die before verdict, or if any other like casualties fall in that behalf." Where indeed, a juror dies or falls ill, the jury are not discharged by the act of the Judge, but by uncontrollable circumstances by which they are reduced below their legal number. [They also cited 2 *Hawk. P. C.* by Curwood, c. 47. s. 1. p. 619., and 4 *Bac. Abridg.*

(a) *Carthew*, 465. See Chief Justice Eyre and Mr. Justice Tracy MS. notes of the same case, and observations on the latter in *Fol.* 24. 28.

7th ed., p. 578, *Juries* (G.).] The rule laid down by *Blackstone*, 4 *Comm.* p. 360, expressly excepts "cases of evident necessity." In *The King v. Edwards* (a) Lord *Ellenborough* recognised this rule, and *Crompton J.*, in *Conway and Lynch v. The Queen* (b), says: "This rule seems to apply equally to all criminal cases." But *Blackstone* refers only to *Gould's Case* (c), *Hil.* 1764, which was an indictment for murder, upon the trial of which one of the jurors fell ill. [*Cockburn C. J. Blackstone* refers to it as the only case of necessity which had been recorded within his knowledge.] All the cases from the time of *Ed.* 3. to the present day, with the exception of those in the time of *Car.* 2., have been cases of necessity in the strictest sense of the word, or cases in which the jury have been discharged at the instance of the prisoner, as in *Kinloch's Case* (d). The case in 21 *Ed.* 3, 18., cited in *Co. Lit.* 227 b., is explained by Sir *Michael Foster*, pp. 32, 33, as falling within the rule in *Br. Abr. Corone*, pl. 42, that a man who has been arraigned for felony, and pleaded not guilty, cannot afterwards become an approver; and therefore it was merely the Judge declining to allow the prisoner to be approver. But in *Fitz. Abr. Corone & Plees del Corone*, pl. 449, the case is abridged, and the reason given is: "pur ceo que l'enquest ne serra discharge, mez le Courte lui oyest et tiel come il accuse que le viscount eux fra endite en son counte &c." [*Blackburn J.* That passage is an authority that it could not be done with the consent of the Crown. *Crompton J.* There is no objection to the prisoner withdrawing his plea: doubt has been suggested

1861.

THE QUEEN
v.
CHARLES-
WORTH.

(a) 4 *Taunt.* 309, 311.(b) 7 *Irish Law Rep.* 171.(c) See 18 *How. St. Tr.* 415, note; 3 *Chitty's Burn's Justice*, 974, 29th ed., tit. *Jurors*.(d) *Foster*, 16. 32.

1861.

The QUEEN

v.

CHARLES-
WORTH.

at the *Old Bailey* whether the plea could be withdrawn, but I have allowed it to be done.] In *The King v. Jane D*—(a) the ground of the discharge of the jury was “the witnesses, not appearing, were suspected to be tampered with by the prisoner:” that case stands on the rule that no man can take advantage of his own wrong. [*Blackburn J.* Suppose it was discovered that the prisoner had bribed the jury *Crompton J.* It would be difficult to aver against the record; though it might amount to error in fact.] There is nothing on this record to justify the Court in assuming that the defendant instigated the witness not to give evidence. The record states that the Judge ordered the jury to be discharged “for the reasons aforesaid, and for no other cause whatever. When the verdict is procured by the misconduct of the prisoner it is not a legal verdict. [*Crompton J.* Suppose that by the fault of a third party there is no verdict.] If it is not by the fault of the prisoner, it does not come within the principle of necessity. Even if a witness, by collusion with the prisoner, gives false evidence, it has never been heard that the jury could be discharged. In *Mansell’s Case (b)*, 26 *Eliz.*, at the *Newgate Sessions*, the jury were discharged with the consent of the prisoner, which *Foster J.*, in *Kinloch Case (c)*, thought “ought not to have been done. The record in the former case, upon which the opinion of the Judges was taken whether the prisoner could be tried again, stated that the foreman of the jury answered that the prisoner was guilty, and the other jurors said they were not agreed, and that because the said verdict appeared to the Court to be uncertain, vicious and

(a) 1 *Ventr.* 69.(b) 1 *Ander. Rep.* 103.(c) *Foster*, 31.

insufficient in law, "Quæsitum est de pæfat. *Thoma Mansell* si velit de jurat. prædict. necnon de veredicto suo in forma prædict. reddito exonerari necne, qui dixit quod ipse contentus fuit de jurat. illa necnon de veredicto suo prædict. in forma prædict. reddit. exonerari, et sic idem *Thomas* ex assensu suo proprio de jurat. prædict. per Cur. hic exoneratur." [*Crompton J.* I should conjecture that the prisoner never did consent: such an entry was often made when it was the act of the Court.] In that case the jury were discharged before it appeared that the disagreement was permanent. In *The King v. Taverner* (a) a coroner's jury in the county of *Hertford*, who would not agree upon a verdict, were, it seems, discharged by authority of *Flemming C. J.*, who was then attending the assizes at *Hertford*, which would have been unnecessary if the coroner had an inherent power to discharge them. *Hanscom's Case*, 15 *Car.* 1, cited in 2 *Hale P. C.* ch. 41, 295, 296, where one of the jury wilfully left the assize town, was a case of necessity. In the time of *Car. 2.* a practice prevailed of discharging the jury by reason of the insufficiency of the evidence produced, or in the power of the counsel for the Crown to produce, at the trial: but that is to be found only in the trials of notorious criminals, or in the state trials, and may have been adopted by the Judges for the purpose of preventing justice being defeated. [As to the character of the administration of justice in some of those trials, they cited *Hallam's Constitutional History of England*, ch. xii. vol. 2, p. 294, 4to ed.] The passage in 2 *Hale P. C.* ch. 41, 295, is the only authority on the other side. [They referred to the note, *ibid.*, by *Serjeant Wilson*.] The resolution of the Judges in *Ferrar's Case* (b) may have been intended to apply to such cases of neces-

1861.

THE QUEEN
V.
CHARLES-
WORTH.

(a) 3 *Bulstr.* 171. 173.(b) *T. Rajm.* 84.

1861.

The QUEEN
v.
CHARLES-
WORTH.

sity as the death of a juror or the disagreement of the jury, and it is said by Sir *T. Raymond* to be "conformable to common tradition, which hath been held by the learned in the law." [*Crompton J.* The common tradition may have arisen from the peculiarly severe charge to the jury in cases of felony—they are sworn to make true deliverance; in the case of misdemeanors they are sworn merely to try the issue.] The cases in Sir *John Kelyng's Reports*, which were tried at the *Newgate Sessions*, afford an example of the mischief and injustice which might ensue if a Judge had a power of discharging the jury without any limit and without appeal. In *Roberts's Case (a)*, upon an indictment of the prisoner as principal in a burglary, it appeared upon the evidence that he was only accessory after the fact, it was doubted by the Judges whether he might not be indicted again as accessory, and the Judges, to avoid all doubt they discharged the jury. If nothing could be done, the Judge might in every case deprive the prisoner of the benefit of pleading autrefois acquit. In *Gardiner's Case (b)*, which was an indictment for breaking open a house in the day-time, the jury were discharged because the evidence could not be made out without further examinations taken by the Lord Mayor, and he was absent. In *Jones and Bever's Case (c)*, on an indictment for burglary, the Judges agreed that they might have discharged the jury when they saw the evidence was not sufficient. In *Whitebread and Fenwick's Case*, who were tried for high treason, with *Ireland* and others, on the first trial, there being only one witness against them, the jury were discharged of them; and upon a second trial on a fresh indictment, *Whitebread* too

(a) *J. Kelyng*, 25.(b) *J. Kelyng*, 46.(c) *Id.*, 52.(d) 7 *How. St. Tr.* 79, 119, 120, 311, 312.

objection, which was overruled by the Judges, but is now admitted to have been a valid objection, that he was put upon his trial the second time. In *Rookwood's Case* (a), after the jury had been sworn, the counsel for the prisoner took several objections to the indictment, and *Powell J.* said, p. 173, "You should have timed your motion better; for certainly now the jury is charged they must give a verdict either of acquittal or conviction."

[They also referred to the observations of Sir *Thomas Trevor*, Attorney General, in *Rookwood's Case*, 13 *How. St. Tr.* 165, 166, and of *Powell J.* in *Cook's Case*, *Ibid.* 324, and Sir *Bartholomew Shower*, *Ibid.* 321, 322.] If the discharge of the jury in this case was wrong, the sending the case down to trial again is destructive of the maxim that a man cannot be put on his trial twice for the same offence. The reason given in 2 *Hale P.C.* 295, ch. 4, in favour of the power to discharge the jury, is a strong one; nevertheless the contrary practice has been followed (b) since the Revolution. [*Blackburn J.* *Foster J.* says it was done "in one or two instances since" the Revolution. *Cockburn C. J.* *The King v. Anne Hawkins*, a later case than *The King v. Perkins*, is cited in *Foster*, 38, from Mr. Justice *Tracy's MS.* In that case a bill of indictment for burglary was preferred against the prisoner for breaking into the house of *S.*, and it appearing on the evidence that the house belonged to *The African Company*, and that the apartment of *S.*, an officer of the Company, was broken into, the jury were discharged of that indictment, and a bill was preferred charging the burglary in the house of *The African Company*; the Judges were of opinion that the prisoner should be tried upon the properly framed indictment.] In that case the Crown exercised the right of withdrawing the record.

(a) 13 *How. St. Tr.* 139.

(b) *Foster*, 30.

1861.

The QUEEN
v.
CHARLES-
WORTH.

1861.

 The QUEEN
 v.
 CHARLES-
 WORTH.

[*Blackburn J.* That may be done in the case of information, but can it be done in the case of an indictment?] Five cases since the Revolution in which the discharge of the jury was held to be wrong, viz. *The King v. Perkins* (a), *The King v. Morgan* (b), 9 G. 2. 1040; *The King v. Jelf* (c), &c., were cited by the counsel for the prisoner in *Fost.* 24. In *The King v. Morgan* (b), where there was an indictment for perjury, and *The King v. Jelf* (c), where there was an indictment for barratry, Lord Hardwicke refused to withdraw a juror at the prayer of the King's counsel. In the latter case, as reported in 2 Str. 984, *nom. The King v. Jeffs*, Lord Hardwicke held that there was no difference between cases of a civil nature and those in which the punishment might be infamous, such as the pillory. [*Blackburn J.* The terms of the report lead me to think that the counsel for the Crown were insisting on the prerogative of the Crown which was never exercised in revenue causes in the Exchequer, as referred to by Lord Denman in *Newton's Case* (d), *Kinloch's Case* (e) *Foster J.* and the Judges who concurred with him decided nothing but the act of the jury then before the Court, that where the prisoner is allowed for his own advantage that the jury may be discharged, it may be done. In such a case the maxim, *consensus est in errorem*, applies; and *Foster J.*, p. 30, expressly decided the question, "whether in a capital case the Court may at their discretion discharge a jury after evidence has been concluded on the part of the Crown, merely for want of sufficient evidence to convict; and in order to allow the prisoner to a second trial, when the Crown may be prepared," which shews that there is no general

(a) *Mich.* 10 W. 3; *Carth.* 465.

(b) *Hil.* 9 G. 2.

(c) *Trin.* 7 G. 2; 2 Str. 984, *nom. The King v. Jeffs*.

(d) 13 Q. B. 722.

(e) *Foster*, 2

in the Judge to discharge the jury on the ground of insufficient evidence. [*Cockburn* C. J. Mr. Justice *Foster* takes some pains to shake the old doctrine, in order to bring in the exception.] If the rule contended for existed, it would almost have been a preliminary bar to the question discussed in *Kinloch's Case* (a). [*Cockburn* C. J. In that case the discharge of the jury was not the act of the Judge. *Blackburn* J. The entry set out in p. 17, is "Upon the motion of *C. H. Hamilton*, Esq., & *Joddrell*, Esq. being assigned as counsel for the defendants in this cause and by their consent, and also at the desire and request and by the consent of the defendants now at the bar here, and also by the consent of Mr. *Attorney General* on behalf of the King, It is ordered by the Court here," &c.] In the case of *Elizabeth Meadow* (b), 1750, at the *Newgate* Sessions, the prisoner was taken in labour. In the case of *John Swan* and *Elizabeth Jefferys* (c), the prisoners having pleaded not guilty to an indictment for murder, their trial was postponed to the next assizes, and in the meantime the counsel for the Crown being satisfied that *Swan* was in the actual service of the deceased at the time the murder was committed, or at least when the design was first laid, thought it advisable to prefer another bill against them, charging *Swan* with petty treason and *Jefferys* with murder; and the prisoners, being arraigned upon this indictment, pleaded in abatement that another indictment was depending for the same offence; but the Judges were of opinion that autrefois arraign was no plea. [*Wightman* J. In that case the precedent in Sir *William Withipole's Case* (d), was followed.] In *The*

1861.

THE QUEEN
V.
CHARLES-
WORTH.

(a) *Foster*, 16. 22.(b) *Fost.* 76.(c) *Fost.* 104. *S. C.* 18 *How. St. Tr.* 1194. 1197.(d) *Cro. Car.* 147.

1861.

The QUEEN
v.
CHARLES-
WORTH.

King v. Edwards (a), where a jurymen fell down in fit, Lord *Ellenborough* observed, "The rule in *Blackstone* admits the exception in case of necessity, which comprehends the present case." In *Conway and Lynch v. The Queen* (b), which was a case of disagreement of the jury, three Judges, against the opinion of *Crampton*, held that the judgment should be reversed; and the judgment of *Crampton* J., only amounts to this, that the Judge is competent to determine without review when the time for discharging the jury has arrived. In *The Queen v. Newton* (c), and *The Queen v. Davison* (d), the ground of discharge was permanent disagreement of the jury. There are two modern cases in which the question has arisen whether a Judge has lawful power to discharge the jury by reason of a failure or insufficiency of the evidence on the part of the Crown, or of the refusal of a witness to answer questions. In *The King v. Wade* before any witness was sworn, the counsel for the prisoner desired to examine the prosecutrix that it might be seen whether she understood the nature of an oath, and it appearing that she had no idea of a future state of rewards and punishments, *Bayley* J. discharged the jury, that she might have an opportunity of being instructed upon that point; but, a doubt having occurred to the learned Judge whether he had done right, he submitted the point to the consideration of the Judges. The discharge of the jury in that case was an exercise of the discretion of the Judge, but the Judges thought the discharge improper (f). In *The King v. Kells*, sta

(a) 4 Taunt. 309. 311. S. C. 3 Camp. 207; Russ. & Ry. C. C. 22.

(b) 7 Irish Law Rep. 149.

(c) 3 C. & K. 85; S.C. on habeas corpus, 13 Q. B. 716.

(d) 2 F. & F. 250.

(e) 1 Moo. C. C. 86.

(f) See *The King v. White*, 1 Leach. C. C. 430, n. (a).

by *Perrin J.* in *Conway and Lynch v. The Queen* (a), from a note taken by himself, the prosecutrix of an indictment for rape, when about to be sworn as a witness, was unable to give evidence, and the jury were discharged: the Judge laid the circumstances of the case before the Judges, in *Dublin*, "who were of opinion, that the prisoner could not be again tried for the same offence." In *Wharton on the Criminal Law of the United States*, 3rd ed., p. 263, it is said: "By the constitution of the *United States* it is provided: 'Nor shall any person be subject for the same offence, to be twice put in jeopardy of life and limb;' and the same restriction, taken from the Federal constitution, exists in the constitutions of most of the States." And then cases in five of the different States are mentioned, the substance of which may be summed up in the decision in a capital case (b), in the State of *Tennessee*. There the jury were empanelled on *Thursday* evening, at two o'clock; and were kept together all night, and at nine o'clock the next morning, upon their declaring they could not agree, the Court discharged them: but "it was held that this was not such a case of necessity as authorized the Court to discharge them. It was out of the power of the Court, it was said, to discharge them without consent, *except in case of sickness, insanity, or exhaustion, among themselves.*" (p. 267). That proposition may however be too broad (c).

1861.

THE QUEEN
V.
CHARLES-
WORTH.

(a) 7 *Irish Law Rep.* 161, 162.

(b) *Mahala v. State*, 10 *Yerger*, 532.

(c) "In each of the foregoing cases the opinion of the Court was founded on the assumption that to be on trial, within the meaning of the constitution, was to be in jeopardy. That such is not the case, but that on the contrary no man is in jeopardy until verdict rendered, has been held by the Supreme Court of the *United States*, by *Washington J.*, *Story J.*, and *McLean J.*, sitting in their several circuits, and by the Courts of *Massachusetts*, *New York*, *Illinois*, *Kentucky* and *Mississippi.*"

1861.
 The QUEEN.
 v.
 CHARLES-
 WORTH.

If the Judge had a discretion to discharge the prisoner, it would have been unnecessary to resort to the process of fining them; *Doct. and Student*, ch. 52; or carrying them in carts after the Judges, *The King v. Ledgingham*, for the purpose of compelling them to give a verdict. [Cockburn C. J. The doctrine of discharging the prisoner on the ground of necessity appears to have been a later growth.] If the Judge had an unlimited discretion, it would be to no purpose to set out on the record a statement of the circumstances under which the discretion was exercised, as was done in *The Queen v. Newton*, and as *Perrin J.* in *Conway and Lynch v. The Queen* said was the proper course. [*Blackburn J.* It is fair towards the prisoner that the circumstances should be put on the record. *Crompton J.* It is necessary to explain why the new process is issued.] The exercise of the discretion cannot be reviewed is an argument against its existence. The exercise of it might condemn the accused to perpetual imprisonment. [Cockburn C. J. That observation applies equally to the power of postponing a trial.] It shews that a discretionary power should not be enlarged. If a sudden impediment occurs, which can be removed, the Judge may adjourn the trial of the case; though that power was formerly denied. [They cited *Lord Delamere's Case* (e); *Eyre C. J.*, in *The King v. Hardy* (f), and in *The King v. Horne Took* (g); *The King v. Wilkes* (h), before Lord Mansfield,

Wharton on the Criminal Law of the United States, 3d ed., p. 268, *U. S. v. Perez*, (5) *Wheaton*, 579.

(a) 1 *Ventr.* 97.

(b) See 4 *Bac. Abr.* 577 in notis, 7th ed., tit. *Juries*.

(c) 3 *C. & K.* 85. 87. 92 note, f. (d) 7 *Irish Law Rep.* 14.

(e) 11 *How. St. Tr.* 510. 559. 561.

(f) 24 *How. St. Tr.* 199. 414.

(g) 25 *How. St. Tr.* 12.

(h) 19 *How. St. Tr.* 1127; *S. C.* 4 *Burr.* 2527.

The King v. Stone (a), before Lord Kenyon; *The King v. Edwards* (b), before Lord Ellenborough; *The King v. Woolf* (c), before Abbott C. J.] In *The Queen v. Tempest* (d), which was a case of felony, Watson B. said that he had no power to adjourn the case until the arrival of the next railway train, by which the witnesses were expected. [Cockburn C. J. In *The Queen v. Wenborn* (e), after the witnesses for the prosecution had been examined, it being discovered that the stolen property was not ready to be produced for the inspection of the jury, Gurney B. tried other cases while the property was sent for, and after it had been brought the trial of the prisoner was proceeded with, and he was found guilty. The reporter (p. 268, note) adds: "The practice adopted in this case is frequently followed at the Central Criminal Court. Quære, as to its propriety."] There is no case in which there has been an adjournment from one day to the next. [Crompton J. It is a sacred rule that the jury shall not separate before giving their verdict. Suppose the Judge, after charging them, allowed them to separate at night; after the verdict, which might be set aside on error, would there not be a venire de novo in the case of a misdemeanor, as there was in *Campbell v. The Queen* (f)?] In that case there was bad jury process. [Crompton J. Suppose the jury do an illegal act, might the defendant say that he could not be tried again?] If the defect appears on the record, and entitles him to reverse the judgment, he cannot be tried again, either by a venire de novo, or on a fresh indictment; though, if the indictment be bad, he may. Cockburn C. J.

1861.

THE QUEEN
v.
CHARLES-
WORTH.

(a) 6 T. R. 527. 530.

(b) Russ. & Ry. 224. S. C. 4 Taunt. 309. 311.

(c) 1 Chit. Rep. 401.

(d) 1 F. & F. 381.

(e) 6 Jur. 267.

(f) 11 Q. B. 799. 814.

1861.

The QUEEN
v.
CHARLES-
WORTH.

Suppose a verdict of murder on an indictment for manslaughter.] If the jury, once charged and sworn on a good indictment for any offence, find a void verdict, they are discharged, the defendant cannot be tried again. In civil trials the Judge cannot, of his own authority, discharge the jury except in cases of disagreement. [Cockburn C. J. Suppose a Judge did discharge the jury for some other reason.] There would be no remedy; but that would not nullify the maxim that no man shall be tried twice for the same offence. Further, in this case the question is whether, if in the course of the trial some unexpected obstacle occurs which deprives the prosecutor of his means of proving the case, the Judge has the power, at the instance of the counsel for the prosecution, and without the consent of the prisoner, to discharge the jury. There is a broad distinction between this and all the cases in which a jury has been discharged on the ground of necessity, real or supposed. In the first case the Judge acted upon the statement of the counsel for the Crown as to the want of other evidence: in the other cases the Judge acts on what is before him, without the interference of counsel on either side, and therefore he necessarily has a discretion.

If the Judge had no power to discharge the jury, there is error on the record; and whenever there is error on the record, it is the duty, in the first instance, of the Court in which the record is, and in the second instance of the Court of error to reverse the erroneous proceeding. If there is an imperfect entry of the verdict so that the issues are not decided, a venire de novo is awarded. [Blackburn J. referred to *The King v. Wilkes* (a).] But where there is an imperfect record, that it will not support the judgment, the judgment may

(a) 5 Burr. 2527.

be reversed, and the prisoners discharged; *The Queen v. Bourne* (a). [Blackburn J. In *Trafford v. The King*, in error (b), where, upon an indictment for a nuisance there was a defective special verdict, the Court said, "under these circumstances, the only course we can pursue is to reverse the judgment which has been given for the Crown, and to award a venire de novo." In *Campbell v. The Queen* (c), upon the question whether a venire de novo might issue, Parke B., delivering the judgment of the Court of Exchequer Chamber, p. 839, drew a distinction between cases of felony and misdemeanor.] This objection being on the record is as much ground of error as the disallowance of challenge of jurors in *Man-sell v. The Queen*, in error (d). That the improper discharge of the jury was not ground of error would have been an answer to the motion in *Kinloch's Case* (e). In *The Queen v. Davison* (f) the Judges did not decide that the discharge of the jury was not ground of error, but that it was lawful, and therefore there was no error. [Crompton J. Admitting that the discharge was unlawful, they held that it was matter of discretion. Cockburn C. J. Pollock C. B. said (p. 254), "We are of opinion, generally, that where a Judge has exercised his discretion, that discretion is not to be made the subject of question. It cannot be ground for error, nor can it be traversed before a jury." Blackburn J. In *Conway and Lynch v. The Queen* (g), Crompton J. argues that if the discharge was wrongful, whether it is a matter of discretion or not, it is not ground of error.] Crompton J. there says: "It is admitted by the Crown that if judgment upon the demurrers should have

1861.

THE QUEEN
V.
CHARLES-
WORTH.

(a) 7 A. & E. 58.

(b) 8 Bing. 204. 213. S. C. 2 Cr. & J. 265. 278.

(c) 11 Q. B. 799.

(d) 8 E. & B. 54.

(e) Fost. 16. 22.

(f) 2 F. & F. 250.

(g) 7 Irish Law Rep. 149. 166.

1847.

THE COURT

WENT ON

TO SAY

THAT

been given for the prisoners, the prisoners were entitled to a judgment of acquittal, just as if the pleas in question had been pleaded to a new indictment, and held to be good pleas: it would have been useless and absurd to have awarded a venire de novo, since the ruling of the jury in favour of the prisoners against the Crown would have decided that the prisoners should never be tried at all, and accordingly the case has been argued before us just as if there had been a new indictment found against the prisoners, and the special pleadings upon which the questions before us arise had been pleaded upon the new indictment." *ibid.* p. 167. "Upon this statement it is impossible not to see, that if the discharge of the jury under the circumstances stated upon this record, either at the first or the second assizes of the year 1843, entitles the prisoners to a judgment of acquittal (as claimed for them by this writ of error), their defence upon this occasion, though not formally, is substantially the well-known defence of *autrefois acquit*, though the averment of the record is, that the prisoners were not tried either at the first or the second assizes; and this averment, in legal construction, cannot be controverted." *Crompton J.* That is, if the discharge of the jury is a bar, the Court ought not to award a venire de novo. The question is, whether the discharge of the jury, even assuming it to have been wrong, is equivalent to acquittal. In *Newton's Case* (a), Lord Denman and Patteson J. thought that it was not. Suppose the Clerk of Assize is left in Court to take the verdict, which cannot legally do, would there be a termination of proceedings, or is it more than an abortive proceeding? Three of the Judges in *Conway and Lynch v. The Queen* held that the discharge of the jury was error, and that

(a) 13 Q. B. 716, 729, 731.

(b) 7 Irish Law Rep. 149.

the prisoners were entitled to judgment. It does not appear what the form of the judgment was; probably it was *quod eat sine die*; but, whatever it was, it would prevent the prisoners being put upon their trial again.

1861.

THE QUEEN
V.
CHARLES-
WORTH.

Cur. adv. vult.

The following judgments were now delivered.

COCKBURN C. J. I am of opinion that this rule ought to be discharged. I adhere to the view expressed by the Court in the course of the argument, that if we could see our way clearly to the conclusion that the Judge in discharging the jury had exceeded the limits of his judicial authority, and also could see that the discharge of the jury operated virtually as an acquittal of the defendant, the Court ought not to allow its process to issue with a view to a second trial, and the rule ought to be made absolute to enter final judgment for the defendant, notwithstanding that course might place the Crown in a more disadvantageous position in bringing error on such judgment of this Court. But I am equally clear that unless the Court can see its way *conclusively* to that result, we ought not to interfere in this stage of the proceedings, but ought to leave the defendant to move in arrest of judgment, or bring his writ of error, if, on the second trial, he should be found guilty.

Two questions present themselves:—1. Whether the Judge had authority to discharge the jury under the circumstances of this case. 2. Whether the effect of that discharge of the jury, if done without authority, entitles the defendant at once to the judgment of this Court that he go without day. Upon neither of these propositions is my mind in such a state of conviction and

1861.

The QUEEN
v.
CHARLES-
WORTH.

certainly as to induce me to think that the Court ought to interfere by making this rule absolute. On the contrary, I am bound to say, though I am by no means desirous that this should be considered a definite opinion, that the inclination of my mind is adverse to the defendant on both points.

First, as to the authority of the Judge to discharge the jury. It is impossible, after the argument which we have heard, and the authorities which have been brought before us, not to feel that the law on that subject is, to a certain extent, in an undefined condition. I apprehend that in no part of our procedure has the practice of the Courts more fluctuated than in relation to the practice of the discharge of the jury in criminal trials. If we go back to the authority of Lord *Coke*, he states, in most positive and unqualified terms, that "a jury sworn and charged in case of life or member, cannot be discharged by the Court or any other, but they ought to give a verdict" (a). It is clear that does not embrace several of the cases in which it is admitted, on all hands, that according to modern practice a jury may be discharged. Lord *Coke* notices neither the death nor the illness of a juror. It was pointed out by Mr. *Mellish*, in his lucid and able argument, that Lord *Coke* must be considered as not including those cases, because the jury would be considered as discharged by the force of circumstances, inasmuch as it would be reduced by the loss of one of its members below the lawful number. But it is further to be observed that Lord *Coke* takes no notice of other cases in which it is admitted now that a jury would be properly discharged, e. g., at the desire of the accused, with the consent of the prosecution, or the case (now of common occurrence) of an impossibility

(a) *Co. Litt.* 227 b.

of their agreeing on their verdict. And if we go back to the period at which Lord *Coke* wrote, we see that the object of the coercion to which juries were then subjected was, by duress, to enforce unanimity. Hence the practice even of taking juries in carts to the confines of the county, and keeping them together for the purpose of compelling them to give a verdict, no matter at how much personal inconvenience and suffering, and not discharging them until the jurisdiction of the Judge was at an end (a). If then this was the law at the time of Lord *Coke*, it has undergone many most important

1861.

THE QUEEN
v.
CHARLES-
WORTH.

(a) It is commonly believed that the object of the law in enabling a Judge to take a jury about with him in carts is to inflict a punishment and indignity on them for not giving a verdict. This, however, has been disputed by Lord *Lyndhurst* in the debate which took place in the House of Lords, March 29, 1859 (*Hansard's Parliamentary Debates*, 3rd series, vol. 153, p. 1020), on a bill brought in by Lord *Campbell* to render unanimity in the jury unnecessary in civil cases. After observing that the impression arose from a note to a case in the *Year Book*, where eleven jurymen had agreed and one dissented, his Lordship proceeds as follows: "The person who reports what took place on that occasion has a note saying, that in the course of the discussion the Judges said that if the jury could not agree the Judges should have taken them with them in a 'carr' until they agreed. The word mentioned is a *French* word abbreviated, which has been mistranslated. What, let me ask, was the mode of travelling in those days? On horseback, or, if not on horseback, in covered waggons. Coaches and carriages were not in use for 200 years afterwards. The proper translation of this word was, that it was the duty of the Judges to have carried those gentlemen with them in covered waggons until they came to an agreement. . . . The word is *carr*, an abbreviation for *carreo*, which means a waggon going on four wheels, and covered with a cloth." The passage here alluded to is to be found in 41 *Assis*. pl. 11, and is as follows: "Nota, q̃ les Justic dis. qu'ils duissent aĩ Carrie l'Assize ove eux en charĩ tanq̃ ils fussent accord; &c." It is worthy of observation that the report of the same case, when it was afterwards moved in banc 41 *Ed.* 3. 31 A, makes no allusion to the subject. Lord *Lyndhurst* also states that "There is no instance to be found in the judicial history of this country in which a jury have been carried round a circuit in a cart." According to the statement of counsel, however, in *Conway and Lynch v. The Queen*, 7 *Irish Law Reports*, 140, 156, it has been done in Ireland within living memory.

1861.

The QUEEN
v.
CHARLES-
WORTH.

changes. But perhaps it may be a question whether Lord *Coke* is well founded in laying down the law in the positive terms in which he stated it. For looking at the passage in *Doctor and Student*, Dial. ii. ch. 52, referred to in the argument, and at the conclusion of *Mansell Case (a)*, we are led strongly to surmise that a different practice existed before the time in which Lord *Coke* wrote. It is observable that he founds his doctrine on a single case; and it is impossible not to think that Mr. Justice *Foster* was right in saying that that case does not warrant the conclusion of Lord *Coke*. At all events it seems that at a comparatively recent period after Lord *Coke*, the doctrine as laid down by him in 1 *Inst.* 227 *b.* and 3 *Inst.* 110, was not recognised as the true doctrine of the Judges; for we find from the express statement of Lord *Hale*, 2 *Hale*, P. C. 294, ch. 41, that not only at the *Old Bailey*, the great criminal Court of this country, but on the circuit it was the habit and practice of Judges, where the prosecution failed for want of proof, to discharge the jury, in order that an opportunity might be given of supplying the deficiency. One of two things is clear. Either the proposition of Lord *Coke* on this subject was not considered by the Judges who immediately followed him as the true exposition of the law, or was not considered as a rule of positive law, but of practice and procedure, subject to variation by the authority vested in the Courts to regulate their own practice. For there can be no doubt that what has been described in the course of this argument and elsewhere as a tyrannical practice in the time of the *Stuarts*, was a practice anterior by many years to the time when its abuse caused it to be brought in question. For though, in the case of *Whitebread and*

(a) *Anders*. 103.

Fenwick (a), this practice of discharging the jury, for the purpose of furthering the administration of justice and preventing its frustration, was converted into an engine of party and political oppression by Chief Justice *Scroggs* and his fellow Justices, yet it is a mistake to say that *Scroggs* and his associates violated the law when *Whitebread* and *Fenwick* were put on their trial a second time; they only did what Lord *Hale* and other most virtuous Judges had treated as the law, and administered as such. But I can quite understand that in consequence of the abuse of the judicial authority, as an instrument of tyrannical oppression in such a case, the Judges would consider whether the benefit to be obtained by preventing the occasional defeat of justice was not bought at too dear a cost, seeing the abuse to which it was liable. And thence arose, no doubt, the consultation of the Judges to which Lord *Holt* referred, when, in *Perkin's Case* (b), he stated the law as the Judges had agreed it should in future be administered. Whether that was upon a review of the authorities in the profession, and a preference of Lord *Coke's* view to that which was adopted between his time and the time of the Revolution, or whether it was matter of regulation among the Judges as matter of policy, it is extremely difficult to say. Much may be said on both sides of that question. As Lord *Hale* points out, it is sometimes a great scandal and lamentable thing that from some defect of evidence, which might easily be supplied by the prosecution, criminals should escape punishment, it being plain that a single case of escape from punishment on manifest though not legally proved guilt, is of most mischievous consequence. On the other hand, in many instances the practice of discharging

1861.

THE QUEEN
V.
CHARLES-
WORTH.

(a) 7 How. St. Tr. 315.

(b) Carth. 465.

1861.

The QUEEN
v.
CHARLES-
WORTH.

juries without giving verdicts may become the means of imposing great hardship and oppression upon prisoners, especially of the lower class, who may, on one occasion, have the means of obtaining legal assistance and bringing their witnesses, and on a second trial may be without those means; therefore I think the practice established after the Revolution, and which has existed from that time to the present, is the better one, and ought to be adhered to. But the question is, whether it is a rule of positive law, or a rule of practice; and then arises another question, is it open to exceptions, and does the present case come within any such exception? The law has been different, and has fluctuated at different periods, for it is plain that even the resolution of the Judges, as stated by Lord *Holt* (a), is not conformable to the practice which has prevailed at subsequent periods; for Lord *Holt* states three propositions:—"1. That in capital cases a juror cannot be withdrawn, though all parties consent to it. 2. That in criminal cases, not capital, a juror may be withdrawn, if both parties consent, but not otherwise. 3. And that in all civil causes a juror cannot be withdrawn, but by consent of all parties. The first proposition was overruled in the case so much adverted to, *Kinloch's Case* (b), in which a juror was withdrawn because the prisoner desired it, and the Crown consented. I see no difference between the prisoner desiring and the Crown consenting, and the Crown desiring and the prisoner assenting, if the prisoner considers that it will be for his benefit. I cannot understand a principle such as that contended for on the part of the defendant, that there should be this authority: the prisoner initiates the application and the Crown

(a) *Carth.* 465.(b) *Fost.* 16. 22. 27.

consents, but not if the Crown initiates it and the prisoner assents to it. But the first proposition stated by Lord *Holt* would embrace the state of things which arose in *Kinloch's Case* (a), for there was the consent of both the prisoner and the Crown. The other propositions stated by Lord *Holt* extend to cases of necessity and the case, which I may call a case of quasi necessity, where the jury are discharged because they cannot agree. It is said that that is a case of necessity too. I cannot agree in that. If by necessity is meant *physical* necessity, namely, that the jury must be discharged from inability to perform their functions as a jury, because it would be inhuman to keep them together longer, there are many cases now in which we discharge juries where that does not arise. And if I understand Sir *Fitzroy Kelly* aright, he admits that if a Judge is satisfied that it is impossible that the jury can agree, he has authority to discharge them. I quite agree that a Judge is not to wait until jurymen are exposed to danger by prostrated strength of body and mind, and until there arises the chance of conscience and conviction being given up for the sake of release from suffering. Our ancestors thought differently; they did not mind how unanimity was produced; but I think that in our days that doctrine would not be acted upon. Therefore I say that the statement of Lord *Holt* is not in conformity with modern practice. We have a third statement of the law in *Blackstone Com.* vol. 4, p. 360, "The jury cannot be discharged (unless in cases of evident necessity) till they have given in their verdict." I say that is not a true exposition of the law as practised in our time. We do take upon ourselves, without the consent of the parties, both in civil and criminal cases, to discharge the jury

1861.

The QUEEN
V.
CHARLES-
WORTH.

(a) *Fost.* 16. 22. 27.

1861.

The QUEEN
v.
CHARLES-
WORTH.

when we are satisfied that they have fully considered the case and cannot agree; and I hope no Judge will shrink from taking that course; for, if a jury cannot agree, we ought not to coerce them by personal suffering, nor ought we to expose parties to the danger of a verdict which is not the result of conviction in the minds of the jury, but produced by suffering of mind or body.

At the same time, while I point out these fluctuations of our law, I entirely concur in this, that upon the whole the rule (whether of law or practice), that a jury shall not be discharged at the instance of the prosecutor, in order to enable him to obtain evidence of which at the trial there is a failure, is a sound and salutary rule, and ought not to be departed from. Whether it be positive law, or practice made by the Judges in the time of Lord *Holt*, is comparatively of little importance; it has been the uniform practice of the judicial authorities from that time to this; and a *rata praxis* like that becomes equal to part of the law, which no Judge ought to depart from, and if found to be inexpedient for the administration of justice, it should be altered by an Act of the Legislature, and not by the resolution of a body of Judges, still less by the act of an individual Judge.

But I should be extremely unwilling to say that there may not be cases in which there may not be superadded to a defect of evidence some additional circumstance, calling for the exercise of authority on the part of Judges to prevent justice from being defeated; and I am therefore exceedingly reluctant to lay down that the above is a positive law as stated by Lord *Holt*. In the course of the argument I put the case of a witness either kept away from Court, or present and refusing to give evidence in consequence of being tampered with by the

prisoner or the accused, and justice thereby in danger of being frustrated. I am not prepared to say that in such a case the Judge may not interpose, by virtue of his judicial authority, to prevent the scandalous frustration of justice by an acquittal under such circumstances. I put the case more than once and did not hear an answer to it. Even Mr. *Mellish*, with his clear logical mind and ability as a disputant, did not grapple with that case. It may be said that it is better there should be a defeat of justice, however inconvenient to tribunals and the public, rather than that a great principle of safety should be removed; it was urged that though no man, even in his wildest dreams, would impute the possibility of corruption to *English Judges*, still Judges might be rash, vain, or impatient, and so lend themselves to oppression. I am not influenced by any such idle apprehension. I have been some years at the bar and on the bench, and have seen much of the administration of justice; and I never saw a Judge, from rashness, vanity, or impatience, lend himself to oppression, or do anything not right, to his knowledge and belief, between the Crown and the party accused. It would not be becoming in me to vindicate myself from such an offensive imputation, but as regards those with whom I have had the honour to act in this or any other Court, I must say, that I am persuaded the bar of *England* will at once repudiate the notion of any danger to the accused from the rashness, the vanity, or the impatience of Judges. Impatience there may be sometimes; the question is whether it is not an honest and well justified impatience; as when elaborate argument is wasted on immaterial or undisputed propositions, or when, material matters being in question, time is occupied with idle common place declamation, or when arguments are repeated again

1861.

The QUEEN
v.
CHARLES-
WORTH.

1861.

The QUEEN
v.
CHARLES-
WORTH.

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That brings us to this question, whether there are cases in which, independently of the concurrence of the accused in the means whereby justice would be frustrated, the Judge would be justified in exercising that authority. And we must take it here that in the act by which justice was about to be defeated (because, though we must not assume that the prisoner was guilty, yet justice was frustrated by the inquiry being stopped), the accused was not a co-operating party with the witness; and therefore the question is whether, assuming that the Judge has authority to discharge the jury, this was a case in which it would be properly exercised. The inclination of my opinion is that, if my brother *Hill* had the authority, this was a case in which it was not fit to exercise it. There may be a difference of opinion on that point, and it is not necessary to decide it. This is one of those cases on the confines. But this I know, that a more cautious or conscientious Judge never sat upon the bench: and, as he only doubted his legal power, and entertained no doubt as to this being a fit case for its exercise, far be it from me to say that he acted wrongly.

The second question presents even greater difficulty in the way of the defendant. Assuming that the Judge had

not this power, or that he exercised it improperly, the question is, whether what he has done amounts to an acquittal of the defendant, and entitles him to have judgment entered up as if he had been acquitted. On this I can add nothing to the conclusive reasoning of *Crompton J.* in *Conway and Lynch v. The Queen (a)*, on which so much observation has been made. There is no instance of such a plea as this, except in this case and that. It may be said with truth that may be because, since the practice established in the time of Lord *Holt*, juries have not been discharged, and therefore the occasion for such a plea has not presented itself. On the other hand, the only pleas known to the law of *England* to stay a man from being tried on an indictment or information (and we must consider this as if it was a fresh information, and the defendant had pleaded to it the facts stated on the record) are the pleas of *autrefois acquit* and *autrefois convict*, and it is clear that this statement of facts amounts to neither. It is said that a man is not to be tried twice, and is not a second time to be put in jeopardy; and that that applies equally to this case as to a case where a man has been convicted or acquitted. In that I cannot concur; and the reasoning of *Crompton J.* is conclusive on that subject. When we talk of a man being twice tried, we mean a trial which proceeds to its legitimate and lawful conclusion by verdict; and when we speak of a man being twice put in jeopardy, we mean put in jeopardy by the verdict of a jury; and he is not tried nor put in jeopardy until the verdict is given. If that is not so, then in every case of a defective verdict a man could not be tried a second time; and yet

1861.

THE QUEEN
V.
CHARLES-
WORTH.

(a) 7 *Irish Law Rep.* 149. 165.

1861.

The QUEEN
v.
CHARLES-
WORTH.

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1861.

THE QUEEN
V.
CHARLES-
WORTH.

(a) 7 *Irish Law Rep.* 149. 165.

1861.

The QUEEN
v.
CHARLES-
WORTH.

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1861.

The QUEEN
V.
CHARLES-
WORTH.

(a) 7 *Irish Law Rep.* 149. 165.

1861.

The QUEEN
V.
CHARLES-
WORTH.

it is well known that, though a jury have pronounced upon the case, yet, if their verdict be defective, it will not avail the party accused in the event of his being put on his trial a second time. Therefore, in my humble judgment (though it is not necessary to decide the point), as at present advised, I cannot come to the conclusion that there has been, in this case, a trial, or that the accused has been put in jeopardy, or put in the position, either in fact or in law, of a man who has been once acquitted, and who, having been once acquitted, cannot be put on his trial a second time.

This being my view, and having given all the attention I could to this case, though I do not wish it to be understood as a final and settled conclusion, I only say that in this state of things we ought not to interpose, and that is all we have to decide. It may be a hardship on the accused that he should be again put on his trial, when, perhaps, on this record being finally made up and taken to a Court of error, it may be held he ought not to have been tried a second time; but we cannot help that. Possibly this may be the only case in which such a question will present itself, because, if it is taken to a Court of error, we shall have the point definitely settled whether the defendant in an indictment or information, upon the trial of which no verdict was given one way or the other because the jury were discharged, is entitled to have that discharge operate as an acquittal, so as to entitle him to final judgment.

But are we at the present moment, and in the present state of the record, bound to prevent this case going to its final conclusion? I think that, unless we can clearly see that the defendant is entitled to be treated as if he had been acquitted, we cannot, with propriety, interfere. By

making this rule absolute, we may, though the inclination of my opinion is the other way, deprive the Crown of the opportunity of taking the case to a Court of error. Therefore I am of opinion that this case must take its course like other cases in which a Judge may have erred, if indeed he has erred. In some cases there may be no remedy except in the event of a result fatal to the accused on the second trial, which might give him an equitable ground for a pardon by the Crown, if serious doubt should be entertained as to the propriety of the discharge of the jury on the first trial. But in this case the defendant will have the opportunity of taking the opinion of a Court of error on that point, if the result of the second trial should be against him.

Therefore this rule must be discharged.

WIGHTMAN J. In a case of this importance, I could have wished for a longer time to consider the many, and not always concurring, authorities that have been cited upon the argument; but, as time is of importance in this case, I have given them the best consideration that I can.

The two great questions that were argued before us were, 1st, whether the Judge was warranted in discharging the jury in this case; and, secondly, whether if he was not, the defendant could again be put upon his trial, and this Court award a venire de novo; or whether the defendant was entitled, upon the matter appearing upon the record, to judgment quod eat sine die. It appeared by the record that the defendant, being charged with a misdemeanor, pleaded not guilty; that a jury was impanelled and sworn to try that issue, and that, because a material and necessary witness for the Crown refused to

1861.

The QUEEN
v.
CHARLES-
WORTH.

1861.

The QUEEN
v.
CHARLES-
WORTH.

give evidence, the Judge, at the request of the prosecutor's counsel, discharged the jury from giving any verdict.

Upon the first point, whether the Judge was warranted in discharging the jury under the circumstances stated upon the record, a great many cases were cited in argument, some in which the jury had been discharged in criminal cases upon ground nearly similar to that in the present case, and others in which the jury had been discharged upon the ground of necessity, as upon the illness of a jurymen, or of the prisoner, or other circumstances occurring, which rendered the further proceeding with the case impracticable; and it was said, and I believe correctly, that in no instance had the jury been discharged under such circumstances as in the present case since the Revolution.

The cases will all be found collected in the report of the case of *Conway and Lynch v. The Queen* (a), and were all commented upon in the argument. In *Kinloch's Case* (b) Mr. Justice Foster, in his judgment, p. 29, reviews and comments upon the cases and the law upon this point, and expresses a strong opinion against the propriety of the Court in its discretion discharging a jury after evidence given and concluded on the part of the Crown, merely for want of sufficient evidence to convict, but refrains from giving any opinion as to the propriety of such a course, where undue practices have been used to keep witnesses out of the way, or where witnesses have been prevented from giving evidence by sudden and unforeseen accidents. The case nearest to the present which has occurred in modern times of which I am aware, is that of *The King v. Wade* (a), in which the prosecutrix, in a trial for a rape, when she

(a) 7 *Irish Law Rep.* 149.

(b) *Foster*, 16. 22.

(c) 1 *Moo. C. C.* 86.

came to be sworn as a witness, appeared to be wholly ignorant of the nature and obligation of an oath, and the Judge before whom the trial occurred discharged the jury in order that the witness might be instructed as to the matters upon which she was deficient, but he reserved the propriety of the discharge of the jury for the consideration of the Judges, who all, with the exception of two who were absent, were of opinion that the discharge of the jury was wrong, and that the prisoner ought to have been acquitted; and a pardon was recommended. It is obvious that the power of discharging a jury at the instance of the prosecutor, on the ground that the evidence was not strong enough to warrant a conviction, but that upon another trial better and more cogent evidence might be obtained, is more objectionable than in that case, and may produce great hardship upon the prisoner or defendant; and I cannot but think that such a power ought not to be exercised upon such a ground, and that in this case my brother *Hill*, whose only object was to prevent what he most reasonably considered might possibly produce a failure of justice, was wrong in discharging the jury upon the ground suggested in the present case.

But, assuming that he was wrong, the second question then arises, how can this error of the Judge, if it be one, be taken advantage of by the prisoner or defendant in case it is proposed to put him upon his trial a second time? Or, indeed, can he take advantage of it at all, except as a ground for the interference of the Crown by a pardon, as recommended in *The King v. Wade* (a)? It is said, for the defendant, that he is entitled to judgment upon the record as it stands of *eat sine die*, upon the ground that, as the Judge at the trial ought not to have

1861.

The QUEEN
v.
CHARLES-
WORTH.

(a) 1 Moo. C. C. 86.

1861.
 The QUEEN
 v.
 CHARLES-
 WORTH.

discharged the jury, but to have directed an acquittal, he is entitled to have the same judgment as if he had been acquitted. But no precedent or authority has been cited to warrant such a judgment in such a case. In the case of *Conway and Lynch v. The Queen* (a) the Court discharged the prisoner; but it does not appear that they gave such a judgment as that now prayed. Upon a plea of autrefois acquit such a judgment might be given, as the jury had actually pronounced their verdict of Not guilty.

But it is said that, as it is a rule of criminal law that a man shall not be twice put in jeopardy for the same offence, if he has once been put upon his trial and the jury sworn he has been put in jeopardy, and therefore cannot by law be tried again, and so is entitled to judgment quod eat sine die. It is necessary to consider, in such a case, what is meant by putting a man in jeopardy, and at what period of the proceedings he is so placed. If he is placed in jeopardy when the jury are sworn and evidence given, he has been in jeopardy though a jurymen may be taken ill, or some unforeseen accident occur, which would be within the ordinary excepted cases in which a jury may properly be discharged; or the jury may give an imperfect verdict, or one which cannot be supported in point of law, in which cases also the prisoner or defendant has been placed in jeopardy, if his being charged before a jury sworn to try him, and evidence given, be a placing him in jeopardy. But in such cases there seems no doubt but that a venire de novo may be awarded, and that the defendant is not entitled to judgment. Has he been more in jeopardy when the jury are wholly discharged, as in the present case, than when they give an imperfect verdict, or are discharged by reason of one being taken ill before they have given

(a) 7 *Irish Law Rep.* 149.

any verdict? Many instances may be given of mistakes, fatal it may be, to prisoners which would not entitle them to judgment. Suppose a Judge were improperly to admit evidence obtained under circumstances which made it inadmissible, and the prisoner was convicted upon such evidence, could he claim judgment *quod eat sine die*, or must not he rely, as in *The King v. Wade* (a), upon the interference of the prerogative of the Crown to pardon? Upon the whole I am disposed to think, with Mr. Justice *Crampton*, as expressed in his elaborate judgment in *Conway and Lynch v. The Queen* (b), p. 178, that "the true and rational doctrine is, that where a trial proves abortive in consequence of no legal verdict being given, a *venire de novo* ought to go, whether the result has flowed from the error of the Judge or the jury or of both."

I have not arrived at this conclusion without much doubt, but I have the less difficulty in expressing it, as the objection now urged for the prisoner will be equally open to him upon writ of error if there should be another trial, even if found guilty; and, if the verdict is for him, the question will not arise.

CROMPTON J. It seems to me that the only question in this case is, ought we to award jury process? I am satisfied from the discussion we have heard that the defendant has a right to come before us and say that matters appear on this record to prevent an award of new process (whether *venire* or *distringas* is not material), and our decision upon that, whether we award process or refuse it, is a judicial act. If we award it improperly it is clear a writ of error lies by the defendant; and whether, if we refuse to award it, a writ

1861.

The QUEEN
v.
CHARLES-
WORTH.

(a) 1 Moo. C. C. 86.

(b) 7 Irish Law Rep. 140.

1861.

The QUEEN
V.
CHARLES-
WORTH.

of error lies by the Crown or not, I think that if it is made out to our satisfaction that there is matter on the record which brings the case to a conclusion, we are bound to give our judgment that this process shall not issue. Therefore the only question is whether there is matter appearing on the record, which in effect terminates the proceedings, by shewing, in the one way of expressing it, that we should not issue jury process, and in the other that the party ought to be discharged. The question consequently comes to this, does the matter appearing on this record prevent fresh process issuing?

In my judgment there is nothing on this record which has that effect in the case of an abortive trial of this kind, whether the abortion has occurred by the act of the Judge or of the jury, or, as was put in the argument, by the act of a mob disturbing the proceedings, or even by the Crown actually interfering, if such a case could happen. Without going at any length into that point, I agree with the Lord Chief Justice and my brother *Wightman*, that this is an attempt to extend the old plea of *autrefois acquit*. When the authorities are examined there is none to shew that an abortive trial prevents a *venire de novo* in the case of misdemeanor. An objection has been made on a technical point, originally taken in the time of Lord *Holt* and afterwards by Lord *Wensleydale* (a). There is said to be an objection to a *venire de novo* in the case of felony. I own that I have a strong opinion on that; and I think that *The King v. Fowler* (b) is an authority to a certain extent upon it. But certainly that technical objection does not apply to a case of misdemeanor. Therefore we have to see whether it is made out that a trial which has failed in this way has the same effect as

(a) See *Campbell v. The Queen*, 11 Q. B. 814. 839.

(b) 4 B. & Ald. 273.

a plea of autrefois acquit. I think it has not. In a plea of that nature it must be averred that there has been a former trial, and that the defendant has been in jeopardy. In this case the defendant was not tried, neither was he in jeopardy in the legal sense of the word. Nothing has been adduced to alter the conclusion to which I have come, founded on the reasoning and judgment of *Crampton J.*, in *Conway and Lynch v. The Queen* (a). I think the reasoning, not only in that part of the judgment, but in the whole of it, is unanswerable. Without repeating those reasons I concur with them, and am of opinion, that upon an abortive trial like this, in case of misdemeanor, judgment for the defendant cannot be prayed as upon a plea of a former conviction, or former acquittal. Mr. *Mellish* did not grapple with this part of the case, but argued that if anything wrong done by the Judge appeared on the record, that would be ground for quashing the proceedings. I do not agree in that. There are many things done by Judges at the trial of criminal cases which cannot be made the ground of such a motion. It is not because something is done of which we do not approve that the trial is to be considered as terminating in favour of the defendant.

The old notion that where a jury was once charged with a prisoner it could be the only jury to try him, has long been exploded. I think it was first exploded in *Ferrar's Case* (b), and the contrary practice has so long prevailed, that we cannot adhere to the old rule. I take the same view as the Lord Chief Justice, where he traced the fluctuations in the practice; and I am in favour of the notion of *Crampton J.* that this is matter of practice, though it is in one sense matter of law,

1861.

The QUEEN
v.
CHARLES-
WORTH.

(a) 7 *Irish Law Rep.* 149. 165.(b) *T. Raym.* 84.

1861.
 The QUEEN
 v.
 CHARLES-
 WORTH.

because process is in one sense matter of law. But whether it be matter of law or practice, we must take the rule now to be, that the same jury which have been sworn ought to try the case, subject to the power of the Judge to interfere if he sees that it is a proper case for interference. It is not necessary to decide this; but I have a strong inclination of opinion that the rule is that the jury ought not to be discharged unless there is some very strong reason for it, which I think is for the Judge to determine. And that it is in his discretion makes me incline to the notion that it is matter of practice rather than of law. I mean "practice" in this sense, that it is a rule to which Judges ought to adhere, and would do wrong if they did not adhere.

Now, it seems to me that what was mischievous in the practice followed in the time of *Car. 2*, and perhaps before, was an abuse of the former practice of discharging juries when it became necessary, and that no doubt was ever made what the result would be if an improper discharge took place. I consider that the Judges in the case of *Whitebread* and *Fenwick* (a), where this practice was used in so odious and dangerous and unconstitutional a manner, which cannot be too much reprobated, took this course, because they knew that if they discharged the jury the prisoner had not the benefit of an acquittal, and therefore was liable to be tried again. And I take what Lord Hale afterwards said in *Perkins's Case* (b), namely, that he would wait for a time but that he would not discharge the jury, to be founded on this, that, if he did discharge the jury, it would not be equivalent to an acquittal.

(a) 7 *How. St. Tr.* 79. 119. 120. 311. 315. 317.

(b) See MS. of *Eyre C. J.* cited in *Foster*, 28.

but the party might be tried again. It is said now, that discharging the jury is equivalent to acquittal. But I think the origin of the Judges, in Lord *Holt's* time, making this rule was, that the abuse of discharging juries for the purpose of getting further evidence was very much to be reprobated, but that the discharge of the jury would prevent the party from saying that he could not be tried again. The old rule of law or practice seems to me to have been adopted for that very end.

With the exception of *Conway and Lynch v. The Queen* (a), in *Ireland*, there is no case in which this has been treated as a legal bar to fresh process issuing, or as a termination of the proceedings in favour of the prisoner. All the other cases rest on different principles. In *The King v. Wade* (b) the Judges met (as they used to do before the Court for considering Crown Cases was established) to consider whether the Judge had tried the prisoner in any improper way, or admitted wrong evidence, or improperly rejected evidence, which could not be made the ground for his being relieved from the consequences of a conviction, and, if they thought there had been anything wrong, they recommended a pardon. It was never suggested, before *Conway and Lynch v. The Queen* (a), that the discharge of the jury could be made matter of plea. In that case three Judges gave judgment against one: but on examining the judgments, I am quite satisfied with that of *Crampton J.* In *Newton's Case* (c) a very strong opinion was expressed by the Court that the discharge of the jury was not equivalent to an acquittal. That case came before the Court on a motion for a habeas corpus. I have a difficulty in seeing why, if the discharge of

1861.

The QUEEN
v.
CHARLES-
WORTH.

(a) 7 *Irish Law Rep.* 149.(b) 1 *Moo. C. C.* 86.(c) 13 *Q. B.* 716.

1861.

The QUEEN
v.
CHARLES-
WORTH.

the jury was equivalent to an acquittal, the prisoner was not entitled to be discharged. If there was a termination of the proceedings against her, I do not see why she was not discharged. I do not quite understand what was meant by saying that the commitment for the murder was still standing. Surely, if the prosecution for the murder was done away, the accused party was acquitted, and ought to have been discharged. However I use the case to shew that the Court did not consider itself as concluded by *Conway and Lynch v. The Queen*. Lord Denman, p. 729, says, "The jury were improperly discharged: and therefore, as it is contended, the prisoner must be set at liberty. I do not think that conclusion follows either logically or on the legal authorities. Even assuming that the discharge of the jury was improper, I do not see how it is equivalent to an acquittal, or can be a bar to a trial, nor how it could be made the subject of a plea. On this, however, I give no opinion, but merely state it by way of protestation against being supposed to have decided that it may be so pleaded. And again, p. 730, "I am of opinion that the Judge in this case acted rightly: but, even if he had acted improperly, I think it does not entitle the prisoner to be set at liberty, as the original commitment still remains in force. The rule must therefore be discharged." *Patteson J.* says, p. 731, "There has been no trial resulting in a verdict; what took place was not a trial determining the question of her guilt or innocence. Therefore, even if I saw great reason to doubt the correctness of what took place at the Assizes, I should say she was not entitled to be discharged." *Whitwell Coleridge J.* and *Erle J.* said as to discretion has been so often mentioned in the argument that I will

not further refer to their judgments. That case shews the Court considered it an open question, and Lord *Denman* expresses his opinion that the discharge of the jury could not be made the subject matter of a plea, and was not equivalent to a determination of the indictment in favour of the defendant. The last case on the subject, *The Queen v. Davison (a)*, is a still stronger authority. There, on the facts stated in the plea, and I think in the replication also, there was no ground, as contended by the defendant's counsel in this case, for the jury being discharged; certainly no ground within the ruling in *Conway and Lynch v. The Queen (b)*. In *The Queen v. Davison (a)* it was pleaded that the discharge of the jury took place for and by reason of no sufficient or legal cause whatever. It is true that there is a replication that the jury could not agree after deliberating for a "long space of time;" which amounts to this, that for some long time they had not come to an agreement on their verdict; and then, because it was the last case at the Sessions, and the Justices did not choose to wait any longer for the verdict, they discharged the jury. That, according to *Conway and Lynch v. The Queen (b)*, was not justifiable. The Court, however, do not put it on that ground, but on the ground that this was not the subject-matter of a plea. Now, though that case was in an inferior Court, still it was at the great Central Criminal Court where three Judges, after hearing the question solemnly argued, agreed in their judgment; and it is a case of equal authority to the case in *Ireland*, in which three Judges concurred in the judgment, and the Judge who differed from them

1861.

The QUEEN
v.
CHARLES-
WORTH.

(a) 2 F. & F. 250.

(b) 7 Irish Law Rep. 149.

1861.

The QUEEN
v.
CHARLES-
WORTH.

was, in my opinion, right. *Pollock C. B.* said, p. 25
“ We are all of opinion that it is unnecessary to hear
further argument. The question is, whether the plea
is sufficient, and the counsel for the prisoner chiefly
relies on the case of *Conway and Lynch v. The Queen* (1834).
Now, though it has no doubt been laid down in the
text books that a jury cannot be discharged except
under certain circumstances, it does not appear that
prior to that case the improper discharge of a jury was
ever made the subject of a plea. I may observe that
in that case the *Irish Court of Queen's Bench* was
not unanimous; and, therefore, if the necessity arose
should consider that we were quite at liberty to revise
it; but it is observable that the case before them was
of felony, the present being one of misdemeanor only.
I will not stop to make any long remarks on that
distinction; it is however a curious fact that in every
authority up to the time of the Revolution, the rule
has been put as applicable to cases of life and limb, whether
they are felony, and as not applicable to ordinary cases of mis-
demeanor, and still less to criminal prosecutions in the
Court, where the manner of proceeding is different from
that in criminal cases in general; e. g. the defendant
may move for a new trial. But my notion is that the
practice either adopted by the Judges, or growing up
itself after the Revolution, extends to both felony and
misdemeanor; and I think that the rule which ought to
guide Judges, is, that in criminal trials for every kind of
offence, the jury ought not to be discharged except in
cases of evident necessity or propriety. The Chief Baron
goes on to say, “ But we are of opinion, generally, that
where a Judge has exercised his discretion, that discretion
is not to be made the subject of question. It cannot

ground of error, nor can it be traversed before a jury. It seems to me, therefore, that the plea the prisoner has placed upon the record is bad, and that he must yet answer the charge against him." Then my brother *Martin* places his decision chiefly on the ground that the case was one of misdemeanor; and my brother *Hill* says (p. 255) that he adopts the position laid down by Mr. Justice *Crampton* in *Conway and Lynch v. The Queen* (a), where he says that though, as to what is a case of necessity, one Judge might differ from another, still, "it is clear that the Judge has a discretion to exercise; where is the legal limit to his power to be fixed? the prisoner's counsel could not fix it; the Judges in *Kinloch's Case* and Sir *M. Foster* say it cannot be fixed. I need scarcely add that I cannot fix it."

1861.
The QUEEN
v.
CHARLES-
WORTH.

I think these authorities are stronger in favour of its not being matter of plea than any which went before, and it is not made out to my satisfaction, indeed I think it is not true, that such matter operates as a bar if pleaded to a new indictment, and that, if it appears on the record, it does not operate as a termination of the proceedings, and prevent fresh process being awarded. Therefore, I think that we cannot in law refuse to award jury process, but are bound to do so.

On the other part of the case, I think one ought to give one's opinion. I think this is a rule of great importance to guide Judges which has been acted upon since the Revolution, and I think it ought to apply both to misdemeanors and felonies. It is a rule of practice or of law; and I think the Judge ought not to interfere and discharge the jury, merely because the prosecution

(a) 7 *Irish Law Rep.* 149. 172. 173.

1861.

The QUEEN
v.
CHARLES-
WORTH.

fails for want of evidence, and it strikes me that the present is a case of that kind. It would be a nice question whether it could be done in a case of collusion; but here we have no case of collusion at all—it is the same if a witness did not come into Court, or did not answer satisfactorily; it is a failure of evidence for the prosecution. Now, whether that is matter of discretion in the Judge or not, I am bound to say that I should have felt myself bound by the practice to direct an acquittal. I think that the importance of observing the general rule is greater than the importance of justice not being baffled in any particular case. On the part of the Crown it is argued that the interference of the Judge was justified, on the ground that the witness was baffled by justice; but unless that is brought home to the defence, it makes no difference. My brother *Hill* having taken the whole matter before him, and acting in the exercise of his discretion (and I can conscientiously say I think his judgment better than my own), discharged the jury. Still I would have acted on the general rule and universal practice since the Revolution, not to discharge the jury merely because the case for the prosecution failed for want of evidence.

At the same time it is very desirable that juries should not be baffled in this case. It is one of the difficulties of our trial by jury which has often occurred to me, though it is a price well worth paying for that institution, that very often a point arises at the trial where there is no mode of sifting, and one party or the other unduly has the advantage of it. Abroad, trials are protracted, and the wanting evidence is supplied, which is a very bad practice. With us there must be at once

an acquittal or a conviction ; and, on a failure of evidence the jury is discharged.

I think also that the practice of discharging the jury too soon is objectionable. It is said that they should be discharged if the Judge sees that they are not likely to agree. I think that we should take some mean course. It is a dangerous thing to say that the jury should be discharged in a certain time or in a few hours. I think that they ought to be kept, not, as the Chief Justice says, to coerce them, but for such a time as that they should not be able to say, " We need not agree in a verdict ; we will wait for such a time, and then we shall be discharged." Therefore, I do not reprobate the old practice of confining the jury for a reasonable time. Confining them without meat, drink and fire, and exposing them to hunger, thirst and cold, is a barbarous relic of ancient times, and should be got rid of. But I think that they should be kept for a reasonable time, so that they may not wait for their discharge, in order to avoid giving a verdict unpleasant to their feelings.

Upon the whole, I am quite satisfied that there is no matter on this record which entitles the prisoner to be discharged from the information, or to prevent the Crown from having fresh jury process.

I think, therefore, that this rule ought to be discharged.

BLACKBURN J. I also think this rule should be discharged.

This is an information for a misdemeanor. Issue was joined in this Court on the plea of Not guilty. There is an award of jury process and a return of the nisi prius record, on which are entries of what took place at *York*.

1861.

The QUEEN
V.
CHARLES-
WORTH.

1861.

The QUEEN
v.
CHARLES-
WORTH.

From these we find that the jury were sworn and the case commenced, but that no verdict was given, the Judge having discharged the jury, under circumstances stated on the record.

On this the question arises, what is this Court to do judicially? The counsel for the defendant contend that it is a rule of law, that in all criminal cases, as well as misdemeanors as felonies, when once the jury are sworn and the trial begun, that jury must give their verdict one way or the other, unless discharged under circumstances different from those in this case; and they further contend that, if this jury be discharged improperly, the issue can never be tried again, so that judgment could be given against the defendant on the verdict, if found for the Crown. If they are right in this contention, I think this Court should not permit the process to be used for the purpose of causing a trial which could not be available, and that the defendant would be entitled, as of right, to a judgment refusing the process and discharging the defendant from this information; the precise form of which judgment we need not consider now. But unless the defendant is right in saying that, as a matter of law, the discharge of the jury operates so as to prevent the issue being tried, the Crown is, I think, entitled, as a matter of right, to an award of the process to cause that trial, which we must not deny.

The Judge at the trial has power to discharge the jury whenever it is proper, and he is the sole judge of propriety, in this sense at least, that, when he decides that the jury are to be discharged, all must obey him, and the jury must be discharged. It may well be that his order, though it must be obeyed, was improper or made, but it seems to me that, to entitle the defend-

to the judgment his counsel pray for, it must be shewn not only that the discharge of the jury, under the circumstances stated on this record, was improper, but also that an improper discharge of the jury is in point of law equivalent to an acquittal, and entitles the defendant to a discharge as much as a verdict of not guilty would have done. In my mind the only question we have to decide is whether this discharge does amount to a bar in law, and I think we must decide it.

It is not sufficient for the defendant if his counsel can make out that there has been an improper deviation from practice, unless they shew it is in law a bar. There are rules of practice,—I may take as a familiar example that by which a Judge recommends a jury not to act on the unconfirmed evidence of an accomplice (a),—so well established, that a Judge is blameable if he departs from them, and yet a conviction obtained against such a rule of practice would be good in law. In such a case, if the defendant has suffered injury, there is an equitable claim upon the Crown to redress this injury. It is for the proper constitutional advisers of the Crown to say whether such a case is made out.

In *The King v. Wade* (b), which was mentioned by my brother *Wightman*, the Judges were not deciding on the law, but were consulted as the advisers of the Crown. They thought that it was an improper proceeding on the part of a Judge to discharge a jury in order to postpone the trial till a witness could be educated so as to understand the nature of an oath, and I agree with them, for, as it seems to me, the evidence given after an education of this sort would be of a very questionable kind. So think-

1861.

The QUEEN

v.

CHARLES-
WORTH.(a) See *The Queen v. Boyes*, ante, p. 311.

(b) 1 Moo. C. C. 86.

1861.

 THE QUEEN
 V.
 CHARLES
 WORTH.

ing, they recommended a pardon; but their doing so was no expression of an opinion that the course taken by the Judge was beyond his power, or that he had not discretion in a fit case to discharge the jury, and, as far as the course adopted by them in recommending a pardon is an evidence of their opinion, they thought it no bar in law. Here we are not acting as constitutional advisers of the Crown; we are to say whether it is legal to proceed to try this issue after what has happened. It is for the law advisers of the Crown to say whether, if it be legal, it is also proper as a matter of discretion so to do. That, however, is a question for the constitutional advisers of the Crown, of whom I am not now one, to determine on their own responsibility.

I have, however, no objection to state my own opinion as to the propriety of the course taken on the trial of this cause, though it is somewhat extrajudicial: it is that in general it is objectionable for a Judge to discharge a jury after a trial has begun on account of any failure of evidence. The liability to abuse is so great that I think that this should not be done merely because of a failure of evidence. But, I think it cannot be said that, if a Judge has power by law to discharge a jury, he should never exercise that power. In cases of collusion, where it appears that the defendant has instigated a witness to absent himself, or the like, I think a Judge ought to use his power. In the present case I agree with the defendant's counsel, that there is nothing stated on the record to lead to the conclusion that the defendant instigated the witness to refuse to give evidence. If there were, I should have no doubt that it would have been improper not to discharge the jury. But I think, on the state-

ment on the record, it is probable that the witness was not instigated by the defendant at all. Still, I think the Judge had facts before him from which he might well draw the inference that the witness refused to answer for the purpose of defeating justice, by procuring the acquittal of this defendant, from the absence of evidence, thinking he could do so with impunity. I think that, under the peculiar circumstances, it was very desirable that, not only should the witness who committed this contempt of Court be fined and imprisoned, but also that he should be baffled in the object he proposed for himself. It may be that the general rule, that a criminal case once begun should be disposed of, is of such consequence that it would be better to suffer the wrongdoer to obtain his end than break through this rule, and I will not take on myself to say that a Judge who, acting on that notion, should, in such a case as the present, direct an acquittal, might not do well; but, on the whole (though not without doubt), I think that my brother *Hill* (always assuming that he had the power) did better in discharging the jury.

All this, however, is in the nature of obiter dicta: the one point on which I rest my judgment is that, at all events in a case of misdemeanor, the discharge of a jury sworn to try an issue after the trial has begun, even if improper, is not in my opinion a legal bar to a trial of the issue by another jury. I have said "at all events in a case of misdemeanor," because that is the only question before us, and because the law of *England* undoubtedly does, in *favorem vitæ*, make distinction in many cases, and it may be in this, between the modes of procedure in felonies and in misdemeanors.

1861.

THE QUEEN
V.
CHARLES-
WORTH.

1861.

The QUEEN
v.
CHARLES-
WORTH.

The whole foundation of the argument of the defendant is rested on two passages in Lord *Coke* (a), where he expressly speaks only of felonies, where life and limb are in danger, and where a privy verdict may not be given. He is silent as to the effect of an infringement of this rule, and it may well be doubted whether he is doing more than laying down a general rule of practice which he thought ought to guide the Court in felonies, but which was not generally followed.

Before the Revolution it certainly was the practice to discharge a jury whenever the Judge thought the interests of justice required it, in order that there might be a second trial. This was done in all cases, treason and capital felony, as well as misdemeanors. The practice is stated by Lord *Hale* (b) in pretty nearly the same terms as it is stated by Lord Chief Justice *North* in the case of *Whitebread* and *Fenwick* (c). Lord *Hale* justifies the practice for reasons which are plausible, and which shew that he thought the discharge was no bar, though the acquittal would have been one. He justifies the practice because, if the jury were discharged, the notorious murderer might be brought to justice, which could not have been if the discharge was a bar as much as the acquittal. But, though his reasons are plausible, the case of *Whitebread* and *Fenwick* (c) shews that the practice was liable to great abuse, and I think it clear that the modern practice by which a criminal trial is not interrupted after it has commenced, except in very exceptional cases, is very much better. I cannot doubt that a Judge would most properly be removed from his office, and impeached, if he were now to dis-

(a) See *Co. Litt.* 227 b.; 3 *Inst.* 110.

(b) See 2 *Hale, P. C.* 295.

(c) 7 *How. St. Tr.* 311. 316.

charge a jury under such circumstances as those under which the jury were discharged on the first trial of *Whitebread* and *Fenwick* (a). I think an Attorney General who persevered in putting them on trial again would also be deserving of impeachment; but, supposing this to be done, I doubt whether the Judges before whom the prisoners were arraigned the second time could do otherwise than tell them that they had no legal bar to the indictment even in a case of treason.

1861.

THE QUEEN
V.
CHARLES-
WORTH.

After the Revolution no alteration was made by the Bill of Rights, or any other Act, in the law or practice as to criminal trials, but the practice was changed. The reaction against the old abuses was great. In *The King v. Keite* (b), in 1696, a special verdict was found in a case of felony. The verdict was such that *Holt* C. J. and *Turton* J. thought it warranted a judgment for the Crown. *Eyre* and *Rokeby* JJ. thought the verdict uncertain, and "by them a venire de novo ought to issue." It would appear from the various reports of the case that there was a doubt whether there could be a venire de novo in a case of felony, which, as it seems to me, could only be on the ground that, in accordance with the doctrine of Lord *Coke* in *Co. Litt.* 227 b., the jury once charged with the prisoner ought to give their verdict, and could not be discharged. In the end no decision was given, as Lord *Holt* himself took exceptions to the indictment, which was quashed. This is the only case I find in which the point arose as a matter to be decided as a question of law. It was soon after this case that, in *The King v. Perkins* (c), Lord *Holt* made the

(a) 7 *How. St. Tr.* 311. 316.

(b) 1 *Ld. Raym.* 138. 142. S. C. nom. *The King v. Keate*, *Comb.* 406; 3 *Salk.* 191; 1 *Com.* 13. S. C. nom. *The King v. Keat*, 5 *Mod.* 288; 12 *Mod.* 118; *Skin.* 666; *Cas. temp. Holt*, 481.

(c) MS. of *Eyre* C. J., cited in *Frost*, 28; *Carth.* 465.

1861.

The QUEEN
v.
CHARLES-
WORTH.

statement that, according to one report, he had "had occasion to consider this matter;" according to another, that "all the Judges of *England* were of opinion, in debate amongst themselves," that in capital cases a juror could not be withdrawn, or, in other words, a jury could not be discharged with consent, and in misdemeanors not without consent. What Lord *Holt* did in *The King v. Perkins* (a) is what on every view of the case is now approved of. The Judges could by their resolutions alter the practice, but not the law. It has never been decided that in felony there can be a venire de novo on an imperfect verdict, though the very able judgment of *Crampton J.* in *Conway and Lynch v. The Queen* (b) leads me to think it probable that it can. But if Lord *Holt* thought that there could be no venire de novo in case of an imperfect verdict in misdemeanor except by consent, his opinion has been repeatedly overruled, for I think it clear that, on an imperfect verdict in misdemeanor, a venire de novo is awarded; see *Trafford v. The King*, in error (c). And I agree with the reasoning of *Crampton J.* in *Conway and Lynch v. The Queen*, p. 178, which shews that there is no distinction in principle as to the effect, as a bar, of an imperfect verdict and a discharge of the jury thereupon and any other discharge of a jury. As far as authority goes, the distinction between felony and misdemeanor here becomes important. On the authorities there is no doubt in felony: in misdemeanor I think it clear that there is a venire de novo on an imperfect verdict.

On the argument before us, it was urged that there was a distinction between a discharge of the jury because

(a) MS. of *Eyre C. J.*, cited in *Fost.* 28; *Carth.* 465.

(b) 7 *Irish Law Rep.* 149. 165.

(c) 8 *Bing.* 204. 215; *S. C.* 2 *Cr. & J.* 265. 278.

the Judge had become convinced that it was impracticable that they could give a verdict, which it was said was a case of necessity, and a discharge of the jury where it was manifestly still practicable that they could give their verdict, but the Judge thought it desirable for the ends of justice not to take their verdict, though it was practicable; this, it was said, was *ultra vires* and illegal. The distinction is intelligible, but it cannot be supported without overruling *Kinloch's Case* (a). There the verdict on not guilty might very well have been taken, though the prisoners had not the opportunity of pleading in abatement. It was entirely a voluntary act on the part of the Court which led to the discharge of the jury, and, as is pointed out by *Crampton J.*, in *Conway and Lynch v. The Queen*, p. 176, the whole reasoning of *Foster J.* is founded on the supposition that the Judge had a discretionary power, though he ought never to exercise it without very good reason indeed. The case of *Conway and Lynch v. The Queen* (b) is, as I have already observed, a case of felony, and in so far not necessarily in point in the present case of misdemeanor, but I must say that the admirable judgment of *Crampton J.* convinces me that, even in a case of felony, he was right, and his colleagues, though the majority, wrong. I will not weaken what he has said by repeating or abridging it, but refer to the report, only saying that I subscribe to all his reasoning, except that, as I have already said, I doubt if he is justified (p. 178) in treating it as a settled point that there must be a *venire de novo* on an imperfect verdict in a case of felony. I think this still not determined by authority; see *Campbell v. The Queen* (c).

1861.

THE QUEEN
V.
CHARLES-
WORTH.

(a) *Foster*, 16. 22.(b) 7 *Irish Law Rep.* 149.(c) 11 *Q. B.* 790.

1861.

THE QUEEN
v.
CHARLES-
WORTH.

Since the case of *Conway* and *Lynch* there have been two in *England* where the question arose. In *New Case* (a) Lord *Denman* says (p. 729), "The prisoner was given in charge to a jury at the Assizes, and the jury were, improperly, discharged: and therefore, as it is contended, the prisoner must be set at liberty. I do not think that conclusion follows either logically or on the legal authorities. Even assuming that the discharge of the jury was improper, I do not see how it is equivalent to an acquittal, or can be taken into a trial, nor how it could be made the subject of a plea." And *Patteson J.* says (p. 731) "There has been no trial resulting in a verdict; what took place was a trial determining the question of her guilt or innocence. Therefore, even if I saw great reason to doubt the correctness of what took place at the Assizes, I should think she was not entitled to be discharged." These opinions were given on a return to a habeas corpus, where the question before the Court was whether the prisoner should be detained in gaol to abide a fresh trial. The question whether there should be a fresh trial, was not distinctly raised as in the present case, but it was before the Court; and the learned Judges just quoted evidently thought that, even in the case of a capital felon, an improper discharge of a jury was not equivalent to an acquittal. The last case on the subject is *The Queen v. Davison* (b), where the precise question now before the Court was raised on demurrer at the Central Criminal Court. There, to an indictment for misdemeanor, it was pleaded, that the prisoner had been given in charge to a jury, and they had been improperly discharged by the judge. The replication stated no more than that the justice

(a) 13 Q. B. 716.

(b) 2 F. & F. 250.

it in the exercise of their discretion, because all other business was at an end, and the jury said that they were not likely to agree; this was admitted to be true by the demurrer, and if there was no more than this stated, surely the discharge was indiscreet and premature. Both *Pollock C. B.* and *Martin B.*, p. 254, note the distinction between the case which was one of misdemeanor and that of *Conway and Lynch v. The Queen*, which was felony, but rest their judgment on the more general ground that the improper discharge of a jury could not be the subject of a plea, and my brother *Hill*, p. 255, quotes and concurs in the judgment of *Crampton J.*, in the *Irish* case.

I think these authorities quite sufficient to authorize us to decide that the discharge of the jury is no legal bar to another trial, and therefore that there ought to be such jury process as is necessary to produce the further trial. Whether that is to be entered on the record as a venire de novo, or as a continuation of the former jury process, is a matter not now before us. The rule should be discharged.

Rule discharged.

Subsequently a nolle prosequi was entered by *The Attorney General*.

By stat. 14 & 15 *Vict. c. 100. s. 12.*, a Judge is empowered to discharge the jury from giving any verdict, where a person is tried for misdemeanor, and the facts given in evidence amount in law to a felony, and to direct such person to be indicted for felony.

1861.

The QUEEN
V.
CHARLES-
WORTH.

1861.

Tuesday,
July 9th.

11 & 12 Vict.
c. 31.
*Grounds of
removal.
Acknowledg-
ment.
Evidence.
Case for
opinion of
superior Court.*

The QUEEN against The Inhabitants of the Pa of RUYTON of the Eleven Towns.

The grounds of removal of a female pauper stated a derivative settlement from her great-grandfather; and alleged an acknowledgment that settlement by relief given to her great-grandmother, and collateral relation having been removed to the parish. On the trial an appeal at the Quarter Sessions against the order of removal. Respondents offered evidence to shew the removal to the appellant parish of another collateral relation—the wife of a grandson of the common ancestor—on a settlement also derived from him. This evidence objected to, but received, and the question of its admissibility reserved for this Court: held

1. That the Court of Quarter Sessions were prohibited by 11 & 12 Vict. c. 31. from reserving the above question for the consideration of this Court.

2. Per *Hill* and *Crompton JJ.*, dubitante *Cockburn C. J.*, that evidence was receivable.

ON appeal against an order of two justices of the peace for the city and borough of *Chester*, for the removal of *Ann Rowlands* and her three illegitimate children from the parish of *St. Bridget, Chester*, to the parish of *Ruyton of the Eleven Towns*, in the county of *Salop*; the Court of Quarter Sessions for the city and borough of *Chester* confirmed the order, subject to the following case:—

The pauper *Ann Rowlands* was the daughter of *William Rowlands* the younger, who was the son of *William Rowlands*, who was the son of *Thomas Rowlands* and his wife. The respondents relied upon a settlement in the appellant parish derived from the said *Thomas Rowlands*, the pauper's great-grandfather. In addition to other evidence they tendered an order for the removal of one *Jane Rowlands*, the wife of one *Thomas Rowlands*, the grandson of the said *Thomas Rowlands* and

his wife, from the township of *Wresham Abbott* to the appellant parish, dated the 5th day of *August*, 1830, on a settlement derived from the said *Thomas Rowlands* the grandfather, and a removal under it, which order was never appealed against. They also called the said *Jane Rowlands* to state the circumstances under which the removal took place, and her relationship to the pauper.

1861.

The QUEEN
v.
Inhabitants of
RUYTON.

On the part of the appellants it was objected that this evidence was not admissible. The learned Recorder received the evidence, but reserved for the consideration of this Court the question of its admissibility.

The question for the opinion of this Court is :—

Was the evidence objected to inadmissible in support of the respondent's grounds of removal?

If the Court should be of opinion that it was inadmissible, then the order of Sessions is to be quashed; otherwise the same to stand confirmed.

The grounds of removal and of appeal are to form part of this case, and are as follows, namely :—

Grounds of removal.

“That the said *Ann Rowlands* and her said three children have come to inhabit, and are now inhabiting, in our said parish of *Saint Bridget*, not having resided in the said parish for five years next before the date hereof, so as to become irremovable therefrom, and not having gained a legal settlement therein, nor having produced any certificate acknowledging them to be settled elsewhere; and that they are now actually chargeable to our said parish, and are receiving relief therefrom, which is not made necessary by reason of sickness or accident: that their place of settlement is in your said parish, township or place of *Ruyton of the Eleven Towns*,

1861.

The QUEEN
v.
Inhabitants of
RUYTON.

in the county of *Shropshire*, in right of her father *William Rowlands*, whose settlement is in your said parish, township or place of *Ruyton of the Eleven Towns* in right of his late father the said *William Rowlands*, deceased, whose settlement was in your said parish, township or place of *Ruyton of the Eleven Towns* at the time that his said son the said *William Rowlands* was emancipated; and the said late *William Rowlands*, the said grandfather of the said *Anne Rowlands*, was settled in your said parish, township or place of *Ruyton of the Eleven Towns* at the time his said son was emancipated in right of his father the said late *Thomas Rowlands*, deceased. The settlement of the said *Thomas Rowlands* has been acknowledged to be in your said parish, township or place of *Ruyton of the Eleven Towns*, by the overseers of the poor of your said parish, township or place of *Ruyton of the Eleven Towns* by giving relief to *Ann Rowlands*, widow of the said *Thomas Rowlands*, weekly relief for several years previous and up to the time of her death, whilst she resided in *Pentrefelth* in the township or place of *Wrexham Abbott*. That *Samuel Rowlands*, cousin to the said *William Rowlands*, the father of the said *Anne Rowlands*, and the son of the said *Edward Rowlands*, shoemaker, deceased, and grandfather to the said late *Thomas Rowlands* and *Ann* his wife, was, by an order under the hands and seals of *James Lloyd* and *H. W. Meredith*, Esquires, two of Her Majesty's justices of the peace acting in and for the county of *Denbigh*, bearing date the 19th day of *January* 1843, removed from the said township or place of *Wrexham Abbott* to your said parish, township or place of *Ruyton of the Eleven Towns*; the said order was not appealed against. That neither the said *Anne Rowlands*

or the said *William Rowlands* her father, ever did any act whereby to gain a settlement in their own right: neither did the said *William Rowlands* the elder, deceased, acquire any settlement in his own right previous to his said son *William Rowlands* being emancipated."

1861.
The QUEEN
V.
Inhabitants of
RUYTON.

Grounds of appeal (those which are material are alone set out):—

"1. That the said order is bad and defective on the face thereof.

"2. That the said *Ann Rowlands* and her said children, at the time the said order was made, were not legally settled in our said parish of *Ruyton of the Eleven Towns*.

"3. That the place of settlement of the said *Ann Rowlands* and her said children is not in our parish of *Ruyton of the Eleven Towns* in right of her father *William Rowlands*.

"4. That the place of settlement of the said *William Rowlands* (the father of the said *Ann Rowlands*) is not in our parish of *Ruyton of the Eleven Towns*, in right of his late father the said late *William Rowlands*, deceased.

"5. That the said *William Rowlands* deceased, the grandfather of the said *Ann Rowlands*, was not legally settled in our said parish of *Ruyton of the Eleven Towns*.

"6. That the said *William Rowlands*, the grandfather of the said *Ann Rowlands*, was not settled in our said parish of *Ruyton of the Eleven Towns*, in right of his father the late *Thomas Rowlands*, deceased.

"7. That the said *Thomas Rowlands*, deceased, was not settled in our said parish of *Ruyton of the Eleven Towns*.

"8. That the said settlement of the said *Thomas*

1861.

The QUEEN
v.
Inhabitants of
RUYTON.

Rowlands has not been acknowledged to be in our parish of *Ruyton of the Eleven Towns* by the overseers of the poor of our said parish, by giving to *Ann Rowlands*, widow of the late *Thomas Rowlands*, a weekly relief whilst she resided in *Pentrefelin*, in the township of *Wrexham Abbott*.

"9. That *Samuel Rowlands*, cousin of the said *Liam Rowlands*, the father of the said *Ann Rowlands*, and the son of the late *Edward Rowlands* deceased, and grandson to the said late *Thomas Rowlands*, and *Ann* his wife, was not, by any order in that behalf made, removed from the township of *Wrexham Abbott* to our said parish of *Ruyton of the Eleven Towns*.

F. E. J. McIntyre having obtained a rule calling on the parish of *St. Bridget, Chester*, to shew cause why the order of Sessions should not be quashed; it was argued in *Easter Term*, on 27th *April*: before *Cockburn C. J.*, *Crompton* and *Hill JJ.*

E. Beavan appeared in support of the order of Sessions, but the Court called on

McIntyre and *Horatio Lloyd*, for the appellants. This evidence was not admissible under these grounds of removal. The question depends on stat. 11 & 12 c. 31. The first section having repealed so much of the former stat. 4 & 5 W. 4. c. 76. as provides, in relation to orders of removal, that the notice thereby required be sent by the overseers or guardians of the parish; and obtaining the order shall be accompanied by a copy of the examination upon which the order was made; the second section enacts, "instead thereof such

shall be accompanied by a statement in writing under the hands of such overseers or such guardians, or any three or more of such guardians, setting forth the grounds of such removal, including the particulars of the settlement or settlements relied upon in support thereof: Provided always, that on the hearing of any appeal against any order of removal it shall not be lawful for the respondents to go into or give evidence of any other grounds of removal than those set forth in such statement." Then, by sect. 4. "Whereas a statement of the grounds of removal or of appeal is required to be communicated for the purpose of enabling the party receiving it to inquire into the subject of such statement, and, if need be, to prepare for trial; be it therefore enacted, that upon the hearing of any appeal against an order of removal no objection whatever on account of any defect in the form of setting forth any ground of removal or of appeal in any such statement shall be allowed, and no objection to the reception of legal evidence offered in support of a ground of removal or appeal alleged to be set forth in any such statement shall prevail, unless the Court shall be of opinion that such alleged ground is so imperfectly or incorrectly set forth as to be insufficient to enable the party receiving the same to inquire into the subject of such statement, and to prepare for trial: Provided always, that in all cases where the Court shall be of opinion that any such objection to such statement or to the reception of evidence ought to prevail, it shall be lawful for such Court, if it shall so think fit, to cause any such statement of grounds of removal or appeal to be forthwith amended by some officer of the Court or otherwise, on such terms as to payment of

1861.

THE QUEEN
V.
Inhabitants of
RUTTON.

1861.

The QUEEN
v.
Inhabitants of
RUTTON.

costs to the other party, or postponing the trial to a day in the same Sessions or to the next subsequent Sessions, or both payment of costs and postponement as to such Court shall appear just and reasonable.

The respondents rely on a derivative settlement of the great-grandfather of the pauper, and the ground of removal allege an acknowledgment of that settlement of relief given to the great-grandmother of the pauper by a collateral relation having been removed to the appellant parish. But the respondents further seek to establish the removal to the appellant parish of another collateral relation, the wife of a grandson of the common ancestor. No objections can be gone into which are not stated in the notice of appeal; *Reg. v. The Churchwardens of Birmingham* (a): and each acknowledgment here relied on may be taken as a distinct ground of removal; for, if no acknowledgment is relied on, all the particulars of the settlement may be set out; *Rex v. The Justices of Derbyshire* (b). See also *Burn C. J.* Those cases were before the 11 & 12 Vict. c. 31.] They are still authority, for the only difference introduced by the statute in this respect is, that formerly the particulars of the settlement relied on were disclosed by the examination, whereas now they are disclosed by the order of removal. The object of the statute was to give the means of inquiry. With the notice the appellants here might have come prepared to shew that the relief given to the grandmother of the pauper was given through mistake, or that the settlement obtained by the son was obtained by his own right. If the ground of removal were to be a settlement by hiring and service in the parish, proof of another settlement by hiring and service

(a) 8 Q. B. 410.

(b) 6 A. & E. 88.

another parish would not be admissible to confirm it.

1861.

[*Crompton J.* Where a ground of removal is stated, can you not confirm it by matter not stated? If so, then is not this merely ancillary evidence? Is it not like two counts, in support of which some matter is offered in evidence which might have been made the subject of a third count?] This was not offered as ancillary evidence; if the Recorder had so understood it, he would not have reserved the point. [*Hill J.* The proviso at the end of the 4th section enables the Court of Quarter Sessions to amend the grounds of removal.] No amendment could have been made here, for it would be a prejudice to the appellants to insert a new ground of removal of which they had no previous notice.

The QUEEN
v.
Inhabitants of
BUTTON.

E. Beavan, for the respondents.—This evidence was only offered as additional evidence of an acknowledgment sufficient to support the removal. Acknowledgment is in itself no ground of settlement; it is merely evidence of a settlement. Where a removal proceeded on a settlement by hiring and service and relief in the appellant parish, it was held competent to the appellant parish, under a general notice of appeal negating the settlement, to shew that the relief was given by mistake; *Reg. v. The Inhabitants of Bedingham* (a).

But there is another consideration here, namely, had the Recorder a right to reserve this point? Sect. 7 of the 11 & 12 *Vict. c. 31.* enacts, "The decision of the Court upon the hearing of any appeal against any order of removal, as well upon the sufficiency and effect of the statement of the grounds of removal and of appeal, and of the notice of chargeability, and of the copy or counter-

(a) 5 *Q. B.* 653.

1861.
 The QUEEN
 v.
 Inhabitants of
 RUYTON.

part of the order of removal sent to the appellant parish as upon the amending or refusing to amend the order of removal as aforesaid or the statement of grounds of removal or appeal, shall be final, and shall not be liable to be reviewed in any Court, by means of a writ of certiorari or mandamus, or otherwise."

McIntyre.—This evidence was not offered to prove the removal of the collateral relation, but as a step to prove the settlement of the great-grandfather generally. The proviso at the end of sect. 4 of stat. 11 & 12 *Vict. c. 31* only applies where a settlement as stated is defective in *form*; but the bringing in any new settlement is matter of *substance*. Besides, no application for leave to amend was made at the Sessions.

Cur. adv. vult.

BLACKBURN J. this day sat alone in Court, and read the following judgments.

CROMPTON J. I am of opinion that the respondents are entitled to our judgment.

The only question proposed to us is, "Was the evidence objected to inadmissible in support of the respondents' grounds of removal?" If we think it inadmissible we are to quash the order; otherwise it is to stand confirmed.

For the reasons stated in the course of the discussion, I do not think the evidence inadmissible in support of the grounds in question. The settlement relied upon by the respondents was derived from the pauper's great-grandfather: and the grounds of removal, after stating the derivative settlements of her father

and grandfather, proceed to state that the settlement of the great-grandfather had been acknowledged on two distinct occasions by the appellant parish—first, by giving relief to a descendant of the great-grandfather under a settlement derived from him; and, secondly, by an order of removal of another member of the family on a settlement also derived from the great-grandfather. The evidence objected to was that of an order submitted to by the appellant parish for the removal of another member of the same family under a settlement derived in the same way from the great-grandfather.

If the two instances of acknowledgment mentioned in the grounds of removal are to be treated *as the two grounds of removal*, I think that the evidence in question was admissible, as confirming and shewing the nature of such acknowledgment, and as shewing that there was not any mistake about the relief having been given as relief in such a way as to amount to an acknowledgment, and as anticipating and rebutting any supposition that the relief might not have been given by the parish, or that it was not so given as to be a binding acknowledgment. As it is stated that other evidence was given, and as the Recorder has decided in favour of the settlement in the appellant parish, we must, I think, consider that he has decided that the grounds of removal were made out; and in this view of the case the evidence objected to seems to me not to have been inadmissible.

If, on the other hand, the grounds of removal are taken to be, that the respondents relied on the settlement of the great-grandfather, and the derivative settlements of the grandfather father and pauper from the great-grandfather, and if the instances of acknowledgment by relief and order submitted to were merely given as

1861.

The QUEEN
v.
Inhabitants of
BUTTON.

1861.

The QUEEN
v.
Inhabitants of
RUYTON.

evidence, then any objection to the grounds of removal would only amount to an objection that the original settlement of the great-grandfather was not sufficiently set out; and that clearly would have been a most imperfect statement of the grounds of removal without stat. 11 & 12 *Vict. c. 31.*, which could not be taken to the advantage of, unless found by the Court below to have been insufficient to enable the other party to inquire and prepare; and the Court below not having so found, no such objection could prevail.

It may have been the case that the nature of the great-grandfather's settlement was not known, and, if any amendment was necessary, it might have been stated to have been unknown; or, if known, the nature of the settlement might have been stated more particularly by way of amendment. And it is by no means clear to me that any statement of the evidence by which the settlement is to be proved is required. The expression "particulars of settlement" seems to point rather to the nature and kind of settlement than to the evidence of it. It probably would have been sufficient to have traced the settlement of the pauper up to the great-grandfather, and if the fact of his settlement were known, but the *kind* of settlement were unknown, to have so stated.

I am disposed to take a very wide view of the enactment of stat. 11 & 12 *Vict. c. 31.*, and to hold it applicable to every case where an objection is made that the grounds of removal are not sufficient to let in the case of the party; and if this be so, it would determine the present case in favour of the respondents, as the only point made for the appellants is as to the evidence being admissible on the grounds of removal stated.

am disposed to think that the effect of the 7th section of stat. 11 & 12 *Vict. c. 31.*, is to prevent any question as to the grounds of removal not being sufficient being brought into this Court, and to make what is done by the Court below final. The grounds of removal seem to me to be put by the enactment in question in exactly the same position as particulars in a trial at nisi prius now stand. If there is an objection to the sufficiency and effect of the grounds of removal, the Court of Quarter Sessions is to consider, just as in the case of particulars, whether they really let in the case of the party; and if not, to amend them, and adjourn the case &c., so as best to meet the ends of justice; and by the 7th section the decision of the Court of Quarter Sessions is to be final. The doctrine of defects and variances in the examinations and grounds of removal before the trial of appeals had been mischievous; and the statute in question was a most beneficial alteration of the law, designed to check a practice which had introduced lamentable and disgraceful technicalities into the trial of settlement cases, and I should be sorry to put a narrow construction on so useful an enactment.

On these grounds I think that our judgment should be for the respondents.

HILL J. This was a rule calling upon the parish of *St. Bridget*, in the city of *Chester*, to shew cause why an order of Sessions, confirming an order of two justices for the removal of *Ann Rowlands* and her three illegitimate children from the parish of *St. Bridget* to the parish of *Ruyton*, should not be quashed.

The rule was argued before us on a special case stated for the opinion of this Court by the Recorder

1861.

THE QUEEN
V.
Inhabitants of
RUYTON.

1861.

The QUEEN
v.
Inhabitants of
RUYTON.

of *Chester*, before whom an appeal against the order of justices came on to be heard. The Recorder confirmed the order of removal, subject to a case. The case stated the order of removal, and set out the grounds of removal in extenso, and also the grounds of appeal. The case further stated certain evidence which the respondents offered in support of the order of removal, and that the admissibility of the evidence was objected to by the appellants, but that the learned Recorder received the evidence; and the question stated by the case for the opinion of this Court is, "Was the evidence objected to inadmissible in support of the respondents' grounds of removal?"

Before answering this question it becomes important to consider whether the Recorder had power to state the case for the opinion of this Court, and whether this Court can review his decision admitting the evidence.

The question really argued before the Recorder was whether the statement of the grounds of removal excluded the admissibility of the evidence. This rendered it necessary to consider the provisions of the 11 & 12 Vict. c. 31., under which the statement of the grounds of removal is given.

By the 1st section of that statute; after reciting that the communication, theretofore by law required to be made by a parish seeking to enforce an order of removal of a copy of the examination upon which such order had been made had been found to produce much expensive and useless litigation upon points of mere form, so that few cases of appeals against such orders were then decided upon the merits; for remedy thereof it was enacted that the then existing law in that behalf should be repealed: and instead thereof, by

the 2d section, it was enacted, that notice of an order of removal shall be accompanied by a statement in writing setting forth the grounds of removal, including the particulars of the settlement relied upon in support thereof. The 2d section further contains a proviso, that upon the hearing of any appeal against an order of removal it shall not be lawful for the respondents to go into or give evidence of any other grounds of removal than those set forth in such statement. The 4th section gives the sessions before whom the appeal is heard the most ample powers to allow an amendment of the grounds of removal, for the purpose not only of fully meeting the justice of the case, but of securing a trial on the merits; and, by sect. 7, the decision of the Court, upon the hearing of any appeal upon the sufficiency and effect of the statement of the grounds of removal, is declared to be final, and shall not be liable to be reviewed in any Court by means of a writ of certiorari or of mandamus, or otherwise.

Looking at the provisions of this statute, I am of opinion that we have no power to review the decision of the learned Recorder. The plain and manifest intention of the statute was to get rid of expensive and useless litigation upon points of mere form, and to facilitate the settlement of all disputes upon contested orders of removal. Its provisions are framed so as to enable the litigating parishes to prepare for trial on the merits; and to aid this object large powers of amendment are given to the Court before which the appeal is heard, on such terms as to payment of costs or postponing the trial as to the Court shall appear just and reasonable. The statute having made these provisions, by which a trial on the merits is effectually secured before a com-

1861.

The QUEEN
v.
Inhabitants of
RUTTON.

1861.

 THE QUEEN
 v.
 Inhabitants of
 RUYTON.

petent tribunal, with the same object of preventing expensive and useless litigation, expressly enacts that the decision of the Court upon the hearing of the appeal, as to the sufficiency and effect of the statement of the grounds of removal, shall be final and conclusive.

In the case sent to this Court by the Recorder of *Chester* the question is one upon the effect of the statement of the grounds of removal. For the appellants it was argued that the statement of the grounds of removal excluded the admissibility of the evidence; whilst, on the part of the respondents, it was argued that such was not the effect of the statement of the grounds of removal: in other words the question argued between the parties was one upon which it is expressly enacted, by sect. 7, that the decision of the Court of Quarter Sessions upon the hearing of the appeal shall be final and conclusive, and shall not be liable to be reviewed in this Court. I therefore think that the Recorder had no power to state the case for the opinion of this Court, and that this Court has no power to review his decision.

If this Court had the power, and we were required to answer the question, in my judgment the evidence was admissible in support of the grounds of removal. The statute requires "a statement in writing, setting forth the grounds of the removal, including the particulars of the settlement relied upon in support thereof;" but the statute does not require any statement of the evidence by which the party obtaining the order of removal intends to support the removal. In the present case the settlement of the pauper relied on was derived from her great-grandfather; and the statement of the grounds of removal, after setting forth the derivative settlements of her father and grandfather, alleged that the settlement

of the great-grandfather had been acknowledged by the appellant parish by the payment of weekly relief for several years to his widow, and by an order of removal submitted to, particularly set out in the statement.

1861.

The QUEEN
V.
Inhabitants of
RUTTON.

It appears to me that the acts relied on as establishing an acknowledgment binding on the appellant parish are not grounds of removal within the meaning of the statute, but are merely evidence on which the respondents rely to fix the appellants with having acknowledged the settlement. The statement of the grounds of removal does not allege that the nature of the great-grandfather's settlement was unknown; and possibly the statement, if the objection were taken, might be considered imperfect, and to require an amendment. But it does not appear that any such objection was taken, and the appellants treated the statement of the acts of acknowledgment as if they were grounds of removal. Even if they were right in so doing, that would not exclude the evidence, for it may well be that the appellant parish might contend that the giving of relief was not a binding acknowledgment, but that the relief was given in mistake; and the evidence offered may have been intended to shew that the relief could not have been given in mistake, but was an act so done as to be an acknowledgment binding on the appellant parish. In this view the evidence was legally admissible in support of and confirming the grounds of removal, and consequently the ruling of the Recorder was correct.

For these reasons I am of opinion the rule must be discharged.

COCKBURN C. J. I concur in this judgment so far

1861.

The QUEEN
v.
Inhabitants of
RUTTON.

only as relates to the absence of jurisdiction in this Court to review the decision of the Recorder.

As to the admissibility of the evidence in question without an amendment of the statement of the grounds of removal, I entertain very serious doubt; but, concurring with the rest of the Court on the other point, I think it is unnecessary to go further into this.

Rule discharged

Tuesday,
July 9th.

Devise.
"Leaving
issue of her
body."
Vesting.
Divesting.

JANE ELIZABETH YOUNG and ELIZA SOMER
SHELTON *against* TURNER.

A testator devised dwelling houses to trustees for the life of his niece *M. S.*, upon trust to permit her to take the rents and profits of the same during her life; and from and immediately after the decease of his niece unto her issue, to be equally divided amongst them at their respective ages of twenty-one years or days of marriage, and to the heirs and assigns of such issue respectively: and if any of such issue should be under the age of twenty-one years at the decease of his niece, he directed an equal share of the rents and profits to be appropriated towards the education and maintenance of such issue as should not have attained the age of twenty-one at the decease of his niece: and if his niece should die leaving only one child, then unto such only child, and his or her heirs as soon as he or she should attain the age of twenty-one. But in case his niece should die without leaving any issue of her body at the time of her decease, or in case all such issue should die under the age of twenty-one years and unmarried, then to his brother's children. *M. S.* married and had one daughter, who attained the age of twenty-one years, but died in the lifetime of *M. S.* unmarried: Held, that, if an estate in fee in remainder vested in the daughter of *M. S.* upon her attaining the age of twenty-one years, such estate was divested upon her death in the lifetime of *M. S.*

THIS was an action of ejectment brought for the recovery of a house in *Coal Pit Lane*, in the town of *Nottingham*; and by a Judge's order, the following case was stated for the opinion of the Court.

John Shelton, being seised in fee of eight dwelling houses in *Coal Pit Lane* (of which the house sought to be recovered in this action was one), by his will

dated the 9th *September*, 1797, gave and devised the eight dwelling houses unto his sister *Elizabeth Shelton*, for life, with remainder to *Joseph Howard* and *William Tatham*, upon certain trusts during the natural life of the testator's brother *George Shelton* not material to be set out; and in the event of the said *George Shelton's* departing this life, leaving the testator's nephew *George Shelton* and niece *Mary Shelton* (children of the said *George Shelton*), or either of them surviving, (and which event happened), the testator gave and devised the dwelling houses to the said *Joseph Howard* and *William Tatham* and the survivor of them, and his heirs, for and during the natural life of his said niece *Mary Shelton*, upon trust to permit and suffer his said niece to take the rents and profits of the same during her natural life.

The testator's will then proceeded as follows: "And from and immediately after the decease of my said niece I give and devise the said messuages, tenements, hereditaments and premises in *Coal Pit Lane* aforesaid unto the issue of the body of her my said niece, as well male as female, to be equally divided amongst or between them at their respective ages of twenty-one years or days of marriage, which shall first happen, share and share alike, and to the heirs and assigns of such issue, respectively: and if any of such issue should be under the age of twenty-one years at the decease of my said niece as aforesaid, then it is my will and I do direct that an equal share of the rents and profits of the said hereditaments and premises may be appropriated towards the education and maintenance of such issue as shall not have attained the age of twenty-one years at the decease of my said niece as aforesaid: and if my said niece shall depart this

1861.

 YOUNG
v.
TURNER.

1861.

YOUNG
v.
TURNER.

life leaving only one child of her body lawfully begotten then I give and devise all and every the messuages, tenements and dwelling houses situate in *Coal Pit Lane* aforesaid unto such only one child and his or her heirs as soon as he or she shall attain the age of twenty-one years aforesaid. But in case my said niece shall depart this life without leaving any issue of her body at the time of her decease as aforesaid, or in case all such issue shall depart this life under the age of twenty-one years and unmarried as aforesaid, then I give and devise the said messuages, tenements, hereditaments and premises situate in *Coal Pit Lane* aforesaid unto all and every other the children of my said brother *George Shelton*, save and except my said nephew *George Shelton*, as and when they shall severally attain the age of twenty-one years or days of marriage which shall first happen, to take as tenants in common and not as joint tenants, and to their heirs and assigns for ever."

The testator died on the 12th *September*, 1812. His sister, *Elizabeth Shelton*, died in the latter end of *September*, 1824, and was buried on the 3d *October*, 1824. The testator's brother, *George Shelton*, died in the month of *March* 1825, and was buried on the 24th of that month. The testator's niece intermarried with *John Halford* on or about the 19th *July*, 1818. They had one daughter, *Elizabeth Mary*, who died on or about the 10th *June* 1844, during the lifetime of her mother, unmarried, and having attained the age of twenty-one years, after having made her will, bearing date the 8th *June*, 1844, by which she devised and bequeathed all her real and personal estate unto her mother *Mary Halford*.

Mary Halford died on the 26th *June* 1860, and by

her will, bearing date the 21st *December* 1855, she gave, devised and bequeathed all her real and personal estate to the plaintiffs.

The testator's brother, *George Shelton*, had other children besides the said testator's nephew *George Shelton*, and some of those children are now living, and some are dead leaving issue.

The question for the opinion of the Court is: Whether the claimants are entitled in the events which have happened to the said eight messuages in *Coal Pit Lane*.

The case was argued in this Term, *May* 31st; before *Cockburn C. J.*, *Wightman* and *Blackburn JJ.*; by

1861.

YOUNG
v.
TURNER.

Field, for the plaintiffs.—The law favours the vesting of estates, and therefore the testator's niece took a vested estate in the property as soon as she came of age. In 1 *Jarman on Wills*, 758, 3rd ed., it is said: "It may be stated as a general rule, that where a testator creates a particular estate, and then goes on to dispose of the ulterior interest, expressly in an event which will determine the prior estate, the words descriptive of such event, occurring in the latter devise, will be construed as referring merely to the period of the determination of the possession or enjoyment under the prior gift, and not as designed to postpone the vesting." This rule was acted upon in *Maitland v. Chalie (a)*, where a testator bequeathed a sum of money in trust for his daughter *S. C.* for life, and, after her death, as to a moiety thereof, for her children, equally to be divided between them at their respective ages of

(a) *Madd. & Geld.* 243.

1861.

 YOUNG
 V.
 TURNER.

twenty-one, with maintenance during minorities, and, if any of such children should die before attaining twenty-one, his share to go to the survivors; but, in case *S. C.* should die without leaving any child or children, or, leaving such, and they should die before twenty-one, then over. *S. C.* had issue two daughters, who both attained twenty-one, but died in their mother's lifetime. And Sir *John Leach* V. C. held that the word "leaving" must be read as "having," and that the legacies were not divested. That case was followed in *Cassamajor v. Strode* (a). In the clause which provides for an only child of the niece, the word "leaving" means "having;" and it must have the same meaning in the immediately following clause, which provides for the case of the niece having no children. The words "leaving no issue," when applied to real estate, mean an indefinite failure of issue; 2 *Jarm. on Wills*, 473, 3rd ed. In *Hutchinson v. Stephens* (b) the devise was to trustees in trust for the grandson *H. T.* for life, and, after his decease, in trust for the child and children of *H. T.*, at his or their ages of twenty-one years, as tenants in common; but in case *H. T.* should die without leaving any issue of his body living at the time of his decease, then over. *H. T.* had two children, both of whom died in his lifetime, one of them leaving children, who survived *H. T.* Lord *Langdale* M. R. held that, in the events which had happened, the children took estates in fee simple, as tenants in common. [He also cited *Doe d. Cannon v. Ruccastle* (c), *In re Thompson's Trust* (d) and *Thornhill v. Hall* (e).]

(a) 8 *Jur.* 14.(b) 1 *Keen*, 240.(c) 8 *C. B.* 876.(d) 5 *De Gaz & Sm.* 687.(e) 2 *Cl. & Fin.* 22.

Raymond, contra.—The only question is upon the application of the rule of construction to the terms of this will. The construction contended for by the plaintiffs will frustrate the intention of the testator to provide for his brother's children. The proper construction is that the estate did not vest until the death of the testator's niece. The clause begins with the words "from and immediately after the decease of my said niece;" which fix the point of time for vesting to be the death of the niece; and the words "at the decease of my said niece" occur throughout it. In *Denn v. Radcliffe* (a) the words "if living at the time of the death" of a female tenant for life, annexed to a subsequent devise to the tenant in tail, prevented that estate from ever arising, he having died in her lifetime leaving issue. Further, if it was held to be a vested estate, the will shews the intention of the testator to divest it in the events which have happened. [*Blackburn J.* In *In re Thompson's Trust* (b) *Sir James Parker V. C.* makes an observation which, he says, "may always be made in cases where there is this kind of question," namely, "that the testator never contemplated the event which has happened, of a child attaining twenty-one years and dying in the lifetime of the tenant for life. He assumed that the children, if any, would all survive the tenant for life, and then provided for the event of there being infants at her death." *Wightman J.* Each object, that of providing for the children of his niece, and that of providing for his brother's children, was equipollent in the mind of the testator.] In *Bythesea v. Bythesea* (c) the testa-

1861.

 YOUNG
v.
TURNER.

(a) 6 T. R. 512.

(b) 5 De Gex & Sm. 667, 670.

(c) 23 L. J. N. S. Chanc. 1004.

1861.

 YOUNG
 v.
 TURNER.

trix bequeathed the residue of her personal estate upon trust for her grandson for life, and, after his decease, "in case he should leave any child or children," then in trust for all and every such child and children equally, to be paid at the age of twenty-one years, and the share of each such child to be a vested interest in him or her: and from and after the decease of her grandson, "in case he should not leave any such child or children," then over. The grandson had one child only, who attained twenty-one, and died in his father's lifetime, leaving a widow surviving him. In a suit by the widow, claiming to be entitled as the child's representative, it was held by Lord *Cranworth* C., and Sir *G. T. Turner* L. J., affirming the decision of Sir *W. P. Wood* V. C. (a), that the gifts over took effect.

Field, in reply.—*Denn* d. *Radclyffe v. Bagshaw* (b) is placed, in 1 *Jarm. on Wills*, p. 778, 3d ed., under the class of cases which he designates "Estates limited in clear terms of contingency."

Cur. adv. vult.

BLACKBURN J. (*July* 9th), delivered the judgment of the Court.

The first question in this case is whether *Elizabeth Mary* (the daughter and only child of the testator's niece) had, upon her attaining twenty-one, a vested estate in the property in question, though she died in the lifetime of the mother; or whether she had more than a contingent remainder depending upon her surviving her mother.

(a) 17 *Jur.* 645.

(b) 6 *T. R.* 512.

The testator by the devise in his will appears to contemplate, in the first instance, the case of the issue of the body of his niece consisting of more persons than one, and directs that in that case the property shall be equally divided amongst them at twenty-one or marriage, and if any are under the age of twenty-one at his niece's death an equal share of the rent shall be appropriated to their education; and if his niece dies leaving only one child, then the property is to go to such child at twenty-one; but if she dies without leaving any issue of her body, (which is the event that has happened), then he devises the property over to his brother's children.

The object of the testator appears to have been to provide for his niece's issue living at the time of her death, and if she left none at her death, then the estate was to go to his brother's children. The words "issue of her body" would of course include children, grandchildren and great-grandchildren.

If the intention of the testator was not that which is suggested, but that any issue of the body of his niece who attained twenty-one should take a vested estate in the property absolute and indefeasible, though such issue should die in her lifetime, the latter clauses of the devise would be scarcely reconcilable with the previous clause; and it would be necessary, to make them consistent, to substitute the word "having" issue, for the word "leaving" issue,—a violence to language which would only be warranted in order to carry into effect the intention of the testator, and we do not think that the intention of the testator requires any such alteration of his language.

But a second question arises, upon the supposition

1861.

YOUNG
V.
TURNER.

1861.

YOUNG

V.

TURNER.

that an estate in fee in remainder did vest in the issue of the body of the niece upon attaining twenty-one, whether such estate was not divested upon the death of the issue in the lifetime of the niece. By the terms of the will the estate is to go over upon the contingency of the niece dying without leaving issue of her body. That contingency has happened, and if an estate did vest in the issue of the body of the niece attaining twenty-one, it would be divested upon the death of such issue in her lifetime under the terms of the will.

Many cases were cited upon the argument, but as each case depends upon the exact words and expressions used, it is difficult to apply them to cases in which the words and expressions used are not the same. They are all cited and commented upon in the case *Bythessea v. Bythessea* (a), which case seems to approach nearer than any to that now in question, and fully to warrant the construction which we are disposed to put upon the devise in the present case.

Taking the whole of the devise and its terms together, we think that the claimants are not entitled, in the events which have happened, to the property in question.

Judgment for the defendant.

(a) 23 L. J. N. S. Chanc. 1004.

1861.

COOK and others *against* WRIGHT.Tuesday,
July 9th.

1. The compromise of a claim may be a good consideration for a promise, although litigation has not been actually commenced.

2. The defendant was agent for *B.*, the non-resident owner of houses in a district subject to a local Act. Works had been done by the Commissioners for executing the Act, the expenses of which, under the provisions of the Act, they charged on the owners of the adjoining houses. Notice had been given to the defendant as if he had been owner of these houses, calling on him to pay the proportion chargeable in respect of them. He attended at a meeting of the Commissioners, and objected both to the amount and nature of the charge, and also stated that he was not the owner of the houses, and that *B.* was. He was told that if he did not pay, legal proceedings would be taken against him. In the result, the amount charged upon the defendant was reduced, and time was given to him to pay it in three instalments, for which he gave three promissory notes. In an action upon the notes by the Commissioners, Held that there was a sufficient consideration for the notes in the compromise.

Claim.
Compromise.
Consideration.

DECLARATION by the plaintiffs, as payees, against the defendant, as maker of two promissory notes, dated the 7th *February*, 1856. The first count was upon a note for 10*l.* 10*s.*, payable twelve months after date; the second was upon a note for 11*l.*, payable twenty-four months after date. There was also a count upon an account stated. Claim 50*l.* (a).

First plea, to the whole declaration: That, after the passing and coming into operation of The *White-chapel* Improvement Act, 1853, and after the passing and coming into operation of The *Metropolis* Local Management Act, 1855, the defendant made the several promissory notes in the said first and second counts mentioned, at the request of the plaintiffs, and that, at the time of making the said promissory notes, the plaintiffs asserted and represented to the

(a) The suit was commenced in the *Whitechapel* County Court of *Middlesex*, and was removed by certiorari into this Court.

1861.

COOK
v.
WRIGHT.

defendant, and the defendant believed such assertion and representation to be true, that there was then due and owing, and payable from him, the defendant, as the owner of certain lands and buildings in certain streets called *Finch Street, John Street and Dowson's Place*, situate within the parish of *St. Mary, Whitechapel*, to the trustees of the parish of *St. Mary, Whitechapel*, under the provisions of The *Whitechapel Improvement Act, 1853*, divers large sums of money in respect of paving the streets fronting, adjoining and abutting on such lands and buildings. And the defendant says that, at the time of making the said promissory notes no sum of money whatsoever was due or owing or payable from the defendant as such owner to the said trustees, nor was the defendant such owner as aforesaid, and that there never was any consideration or value for the defendant making the said promissory notes in the first and second counts mentioned, or either of them, or for his paying the same, or any part thereof; and the plaintiffs never were, nor was any person, ever a holder of the said notes, or either of them, for value or consideration; and that the account stated, in the declaration mentioned, was stated of and concerning the matters and things in this plea mentioned, and not of or concerning any other matter or thing whatsoever.

Second plea, to the first and second counts: That the defendant was induced to make, and did make, the promissory notes in those counts mentioned, and each of them, by the fraud, covin, and misrepresentation of the plaintiffs and others in collusion with them.

On the trial, before *Wightman J.*, at the Sittings in *London*, during *Easter Term, 1860*, it appeared that the plaintiffs were four of the Commissioners or trustees

acting under and incorporated by sect. 27 of The *Whitechapel* Improvement Act, 1853, 16 & 17 *Vict. c. cxli.*; and the action was brought to recover the amount of the two notes mentioned in the declaration. The evidence as to what took place at the time of the giving of the notes was as follows. *Mitchell*, the clerk to the trustees, said that, certain parts of the district not being in repair in 1854, notices to do repairs were sent or left addressed to the owners; and in *October*, 1855, he wrote a letter to the defendant demanding 70*l.* for expences incurred by the trustees in doing paving works in front of houses, of which the defendant was the owner or occupier, situate in and abutting on public highways within the district of The *Whitechapel* Improvement Act (*a*). The defendant complained that the works done by the trustees had seriously injured the property, and that

1861.

 COOK
v.
WRIGHT.

(*a*) Sect. 38 of stat. 16 & 17 *Vict. c. cxli.* "That in case any present or future street, not being a highway repaired by any Board of Commissioners or trustees or any part thereof, be not from time to time levelled, paved, flagged, and channelled to the satisfaction of the said trustees, and in such manner and with such materials as they may direct, they may, by notice in writing to the respective owners or occupiers of the lands or buildings fronting, adjoining, or abutting upon such parts thereof as may require to be levelled, paved, flagged or channelled, require them to level, pave, flag or channel the same within a time to be specified in such notice; and if such notice be not complied with, the said trustees may, if they shall think fit, execute the works mentioned or referred to therein, and the expences incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective lands or buildings, and in such proportions as shall be settled by the trustees, having regard to all the circumstances of the case; and such expences may be recovered from the last mentioned owners as liquidated damages, or by action on the case, in any county court or superior Court of law, in the same manner as rates hereinafter mentioned, and also in like manner as in and by The Towns Improvement Clauses Act [1847], herewith incorporated, is provided, with respect to the recovery of expences in the clauses of the last mentioned Act with respect to the execution of works by owners."

1861.
COOK
v.
WRIGHT.

the tenants were dissatisfied, and requested him to get an abatement made. He informed the defendant that the trustees assented, and the balance to be paid by the defendant was agreed to at 30*l.*: the defendant then requested time, and time was given, upon condition that he paid interest; and three promissory notes were given by the defendant, the first of which was paid by him under protest. The defendant was called, and stated that Mrs. *Bennett* was owner of the three houses in question, and that he was tenant of one of them, at a rack rent under her, and collected the rents of the others for her; that he paid the paving rate of the house which he occupied, and the paving rates of the other houses he paid for Mrs. *Bennett* and in her name; that, upon receiving the notice of *October* 1855, he went before the Board of Trustees and told them that he was not the owner of the property, and shewed them Mrs. *Bennett's* receipts for the rent. They replied that, as he paid the rates, they considered he was the owner within the meaning of The *Whitechapel* Improvement Act, 1853, and, if he did not give notes, they would serve him as they had served *Goble*, which was by levying an execution on him; that there was another case in which the question of the liability of the inhabitants was to be tried, and, if decided against the trustees, he should not be called on to pay. When the first note became due he complained to *Mitchell* that the trustees had not carried out their promise to try one of the cases. *Mitchell* said that, as the defendant had signed the notes, he must pay them, and that the promised trial should take place: thereupon the defendant paid the first note. The defendant was afterwards told by Mrs. *Bennett* that he was not the owner within the

meaning of the Act, and he thereupon went to a Board meeting of the trustees and told them that he would not pay the other notes. It was contended for the defendant that the notes were given without consideration, the defendant not being an "owner" within sect. 7 of The *Whitechapel* Improvement Act. The jury, in answer to questions put to them by the learned Judge, found that the defendant told *Mitchell* or the Board, before he gave the notes, that he was not the owner; that the defendant mentioned, before he gave the notes, that Mrs. *Bennett* was the owner; and that *Mitchell*, or some member of the Board, told the defendant, in the Board-room, that, unless he gave the notes, he would be served as *Goble* had been. The verdict was thereupon entered for the defendant, leave being reserved to move to enter a verdict for the plaintiffs. In the same Term (*May 4*),

Montagu Chambers obtained a rule to shew cause accordingly, on the ground that the evidence did not prove want of consideration for giving the notes, and that, upon the evidence, the plaintiffs were entitled to a verdict.

This rule was argued in this Term, *May 23d*; before *Cockburn C. J.*, *Wightman*, *Crompton* and *Blackburn JJ.*

Shee Serjt. and *Barnard* shewed cause.—There was no consideration for the notes. The defendant signed them upon the representation by the trustees that they considered him the owner of the houses because he collected the rents, and was liable to pay the rates. But the defendant was not the owner within sect. 7 of stat. 16 & 17 *Vict. c. cxli.*, by which "the word 'owner,' used with reference to any lands or buildings in respect of which any work is required to be done, or

1861.

COOK
v.
WRIGHT.

1861.

 COOK
 v.
 WRIGHT.

any rate to be paid under this Act, shall mean the person for the time being entitled to receive, or who, if such lands or buildings were let to a tenant at rack rent, would be entitled to receive, the rack rent from the occupier thereof."

The existence of disputes and controversies between a plaintiff and defendant, as to whether the defendant is indebted to the plaintiff, is not a sufficient consideration for a promise: there must be a debt in existence; *Edwards v. Baugh (a)*. These notes were not given for the debt of another party: the trustees did not profess to take them in payment of the rates due from Mrs. Bennett. [Crompton J. Suppose money had been paid by the defendant, could he have recovered it back? The maxim *quod fieri non debet factum valet* seems to apply. *Wightman J.* referred to *Southall v. Rigg* and *Forman v. Wright (b)*.] In *Addison on Contracts*, p. 15, 4th ed., it is said: "So if the consideration prove to be a nullity, the promise founded upon it is void, as if the consideration be the forbearance of a suit when there is no cause of action . . . or a promise to pay a debt which never had an existence in point of law."

Hannen, in support of the rule.—1. The plea was not proved. The defendant did not believe the representation of the trustees that he was liable as owner of the houses under the provisions of The *Whitechapel Improvement Act*, 1853.

2. The plea is not good. In *Edwards v. Baugh (a)* the defendant might have been imposed upon as to there being a debt due from him to the plaintiff, but in this case there is no statement that the de-

(a) 11 M. & W. 641.

(b) 11 C. B. 481.

fendant yielded to the assertion that he was owner of the houses—it amounts to no more than that he thought it doubtful whether he was liable. [*Crompton J.* Did the trustees put themselves in a worse position by taking the notes? Might they not the next day have said, “We have mistaken our position,” and have returned the notes?] No. In *Baker v. Walker* (a) *Parke B.* said, p. 467, “If I give a promissory note for the debt of a third person, I am bound to pay it when due.” [*Crompton J.* The defendant gave the note in discharge of his own liability: he took the debt upon himself, whosoever it was, if the trustees would give him time.] The defendant signed the notes because the trustees threatened to sue him, not because he believed himself to be liable; and he obtained time for payment of the debt of a third person, which is a sufficient consideration for giving the notes; *Sowerby v. Butcher* (b). Suppose the trustees had sued *Mrs. Bennett* for the rates, she might have pleaded that the trustees had taken notes for the amount from her agent. The notes were given for the debt claimed to be due in respect of a particular property. [*Cockburn C. J.* The difficulty which I feel is that I do not see in what character the defendant acted when he gave the notes. *Wightman J.* By sect. 11 of stat. 16 & 17 *Vict. c. cxli.*, the provisions of “The Towns Improvement Clauses Act, 1847,” 10 & 11 *Vict. c. 34.*, are incorporated with the first mentioned Act, “with respect to the paving and maintaining the streets, except sections 54 and 55; and provided that sect. 53 shall extend to such streets only as shall be public highways at the time of the passing of this Act, and that the

1861.

 COOK
v.
WRIGHT.
(a) 14 *M. & W.* 465.(b) 2 *Cr. & M.* 368.

1861.

COOK
v.
WRIGHT.

expenses incurred under the last mentioned section shall be repaid by the owners of the lands therein mentioned, and shall be recoverable from the owners or occupiers in the same manner as is provided with respect to the recovery of expences under the provisions for insuring the execution of works required to be done by the owners and occupiers of lands.”]

Cur. adv. vult.

BLACKBURN J. (*July 9th*) delivered the judgment of COCKBURN C. J., WIGHTMAN J. and himself; CROMPTON J. having left the Court before the argument was concluded.

In this case it appeared on the trial that the defendant was agent for a Mrs. *Bennett*, who was non-resident owner of houses in a district subject to a local Act. Works had been done in the adjoining street by the Commissioners for executing the Act, the expences of which, under the provisions of their Act, they charged on the owners of the adjoining houses. Notice had been given to the defendant, as if he had himself been owner of the houses, calling on him to pay the proportion chargeable in respect of them. He attended at a Board meeting of the Commissioners, and objected both to the amount and nature of the charge, and also stated that he was not the owner of the houses, and that Mrs. *Bennett* was. He was told that, if he did not pay, he would be treated as one *Goble* had been. It appeared that *Goble* had refused to pay a sum charged against him as owner of some houses, and the Commissioners had taken legal proceedings against him, and he had then submitted and paid, with costs. In the result it

was agreed between the Commissioners and the defendant that the amount charged upon him should be reduced, and that time should be given to pay it in three instalments; he gave three promissory notes for the three instalments; the first was duly honoured; the others were not, and were the subject of the present action. At the trial it appeared that the defendant was not in fact owner of the houses. As agent for the owner he was not personally liable under the Act. In point of law, therefore, the Commissioners were not entitled to claim the money from him; but no case of deceit was alleged against them. It must be taken that the Commissioners honestly believed that the defendant was personally liable, and really intended to take legal proceedings against him, as they had done against *Goble*. The defendant, according to his own evidence, never believed that he was liable in law, but signed the notes in order to avoid being sued as *Goble* was. Under these circumstances the substantial question reserved (irrespective of the form of the plea) was whether there was any consideration for the notes. We are of opinion that there was.

There is no doubt that a bill or note given in consideration of what is supposed to be a debt is without consideration if it appears that there was a mistake in fact as to the existence of the debt; *Bell v. Gardiner* (a); and, according to the cases of *Southall v. Rigg* and *Forman v. Wright* (b), the law is the same if the bill or note is given in consequence of a mistake of law as to the existence of the debt. But here there was no mistake on the part of the defendant either of law or fact. What he did was not merely the making an erroneous

1861.

 COOK
 v.
 WRIGHT.

(a) 4 M. & Gr. 11.

(b) 11 C. B. 481.

1861.

COOK
v.
WRIGHT.

account stated, or promising to pay a debt for which he mistakingly believed himself liable. It appeared on the evidence that he believed himself not to be liable; but he knew that the plaintiffs thought him liable, and would sue him if he did not pay, and in order to avoid the expence and trouble of legal proceedings against himself he agreed to a compromise; and the question is, whether a person who has given a note as a compromise of a claim honestly made on him, and which but for that compromise would have been at once brought to a legal decision, can resist the payment of the note on the ground that the original claim thus compromised might have been successfully resisted.

If the suit had been actually commenced, the point would have been concluded by authority. In *Longridge v. Dorville* (a) it was held that the compromise of a suit instituted to try a doubtful question of law was a sufficient consideration for a promise. In *Atlee v. Backhouse* (b), where the plaintiff's goods had been seized by the excise, and he had afterwards entered into an agreement with the Commissioners of Excise that all proceedings should be terminated, the goods delivered up to the plaintiff, and a sum of money paid by him to the Commissioners, *Parke B.* rests his judgment, p. 650, on the ground that this agreement of compromise honestly made was for consideration, and binding. In *Cooper v. Parker* (c) the Court of Exchequer Chamber held that the withdrawal of an untrue defence of infancy in a suit, with payment of costs, was a sufficient consideration for a promise to accept a smaller sum in satisfaction of a larger.

(a) 5 B. & Ald. 117.

(b) 3 M. & W. 633.

(c) 15 Com. B. 822.

In these cases, however, litigation had been actually commenced; and it was argued before us that this made a difference in point of law, and that though, where a plaintiff has actually issued a writ against a defendant, a compromise honestly made is binding, yet the same compromise, if made before the writ actually issues, though the litigation is impending, is void. *Edwards v. Baugh (a)* was relied upon as an authority for this proposition. But in that case Lord *Abinger* expressly bases his judgment (pp. 645, 646) on the assumption that the declaration did not, either expressly or impliedly, shew that a reasonable doubt existed between the parties. It may be doubtful whether the declaration in that case ought not to have been construed as disclosing a compromise of a real bonâ fide claim, but it does not appear to have been so construed by the Court. We agree that unless there was a reasonable claim on the one side, which it was bonâ fide intended to pursue, there would be no ground for a compromise; but we cannot agree that (except as a test of the reality of the claim in fact) the issuing of a writ is essential to the validity of the compromise. The position of the parties must necessarily be altered in every case of compromise, so that, if the question is afterwards opened up, they cannot be replaced as they were before the compromise. The plaintiff may be in a less favourable position for renewing his litigation, he must be at an additional trouble and expence in again getting up his case, and he may no longer be able to produce the evidence which would have proved it originally. Besides, though he may not in point of law be bound to refrain from enforcing his rights against third persons during the continuance of

1861.

COOK

v.

WRIGHT.

(a) 11 M. & W. 641.

1861.

COOK

v.
WRIGHT.

the compromise, to which they are not parties, yet practically the effect of the compromise must be to prevent his doing so. For instance, in the present case, there can be no doubt that the practical effect of the compromise must have been to induce the Commissioners to refrain from taking proceedings against Mrs. *Bennett*, the real owner of the houses, while the notes given by the defendant, her agent, were running; though the compromise might have afforded no ground of defence had such proceedings been resorted to. It is this detriment to the party consenting to a compromise arising from the necessary alteration in his position which, in our opinion, forms the real consideration for the promise, and not the technical and almost illusory consideration arising from the extra costs of litigation. The real consideration therefore depends, not on the actual commencement of a suit, but on the reality of the claim made and the bona fides of the compromise.

In the present case we think that there was sufficient consideration for the notes in the compromise made as it was.

The rule to enter a verdict for the plaintiff must be made absolute.

Rule absolute.

1861.

PEARSON *against* SPENCER.Tuesday,
July 9th.

1. On a severance of two tenements, no right to use ways, which during the unity of possession have been used and enjoyed in fact, passes to the owner of the dissevered tenement, unless there be something in the conveyance to shew an intention to create the right to use these ways de novo.

2. The same rule in this respect applies to a will as to a deed.

3. Where property devised or granted is landlocked, and there is no other way of getting at it without being a trespasser, so that it cannot be enjoyed without a way of some sort over the land of the testator or grantor, a way of necessity is created de novo.

4. The ground on which the way of necessity is created is, that a convenient way is implied by grant as a necessary incident.

5. The way of necessity once created, must remain the same way as long as it continues at all.

6. Where a portion of land is devised in such a manner as to be landlocked, the extraneous facts shewing that by that devise the testator intended to create a convenient way of some sort over adjoining property of his own, the line of the way must be discovered from the language of the will, understood with reference to the state of the property.

7. *Quere*, in what manner the way is to be set out, if the premises before severance were so occupied as to afford no indication of what was the usual way in the testator's time, and the devise is silent on the subject?

*Way of necessity.
Devise.*

TRESPASS for breaking and entering three closes of the plaintiff, denominated respectively "*The Great Ing*," "*The fold of plaintiff's farm, called 'Upper Isle,'*" and "*The Back of House Field.*"

The defendant, besides the general issue, and several other pleas, to which it is unnecessary to refer, pleaded the following:—

"And for an eighth plea, as to all the trespasses, the defendant says, that before the time of the committing the same trespasses, and before the plaintiff was possessed of or had any interest in the said closes, or either of them, one *Jamés Pearson*, during his lifetime, and at the time of his decease, was possessed of and entitled to the residue of a then current term of 999 years, created by

1861.

PEARSON
v.
SPENCER.

an indenture of lease, dated the 15th *January* A.D. 1663, as well of and in the said closes in the declaration mentioned as of and in a certain other farm, buildings, land and premises adjoining to the said closes of the plaintiff, and hereinafter called the adjoining tenements; and the said *James Pearson* being so possessed and entitled as aforesaid, before the 1st *January*, 1838, made his last will and testament in writing, whereby, amongst other things, he bequeathed to his son *Abraham*, as soon as he should attain the age of twenty-one years, and to his heirs, executors and administrators, the said adjoining tenements for and during all the residue of the said term of 999 years, subject to a moiety of the rent payable thereout under the said indenture of lease; and the said testator also by his said will bequeathed unto his son *John*, as soon as he should attain the age of twenty-eight years, and to his executors, administrators and assigns, the said closes in the declaration mentioned for and during all the residue of the said term of 999 years, subject to the other moiety of the said rent: and the said testator by his said will appointed *James Mortimer* and *Joshua Robertshaw* joint executors of his said will; and afterwards, to wit, on or about the 28th *March*, 1826, the said testator, being then still so possessed and entitled as aforesaid, died, without having revoked or otherwise altered his said will; after whose death the said will was duly proved by the said *J. Mortimer* and *J. Robertshaw* in the Prerogative Court of the Archbishop of *York*, being a Court then having power and jurisdiction to grant probate of the same, in which said province all the said lands and tenements were situate; which said executors afterwards, and before the said time when, &c., and before the last mentioned closes were the plain-

tiff's, and before the plaintiff had any interest therein, duly assented to the said bequests; and after the death of the said testator the said *Abraham Pearson* attained his age of twenty-one years. And the defendant says, that the said testator in his lifetime, before and at the time of the making the said will, and thence until and at the time of his death, was entitled to and had and used a right of way from and out of a certain highway towards, unto and into the said close called *The Great Ing*, and back again from and out of the close called *The Great Ing*, towards, unto and into the said highway, for himself and his tenants, occupiers of the said several tenements so bequeathed to the said *Abraham* and *John Pearson* as aforesaid, and for his and their servants, on foot and with cattle, carts and carriages, every year, and at all times of the year, for all the residue and remainder then to come of the said term of 999 years, for the convenient occupation and enjoyment of the closes in the declaration mentioned and the said adjoining tenements. And the defendant further says that, at the time of the making of the will herein mentioned, and thence until and at the time of the death of the said testator, there was no way for cattle or carriages from any highway towards and to the several adjoining tenements without passing over the said closes in the declaration mentioned, or some or one of them, and that the said testator in his lifetime, before and at the time when he made his said will, and thence until and at the time of his death, was in the habit of crossing, as the way to and from the said adjoining tenements, the said way from and out of the said highway towards, unto and into the said close called *The Great Ing*, and from the

1861.

PEARSON
V.
SPENCER.

1861.
PEARSON
v.
SPENCER.

place where the said way so entered the said close called *The Great Ing*, a way, through, over and along the said close called *The Great Ing*, towards, unto, into, through and over the said closes called *The Fold* and *Back of House Field*, towards, unto and into the said adjoining tenements, and thence by the same route back again to the place where the said first mentioned way joined the said close called *The Great Ing*, and from thence towards, unto and into the said highway. And the defendant says that by the said will the said testator did not expressly bequeath to the said *Abraham Pearson* any way to the said adjoining tenements, but simply bequeathed him the said adjoining tenements as aforesaid, without in any manner indicating by his said will how or by what means the said *Abraham Pearson*, his executors, administrators or assigns, and his and their tenants and servants, or any of them, were to go to or from the said adjoining tenements. And the defendant further says that, at the time when the testator made the said will, and thence until and at the time of his death, and always afterwards, the said way which the said testator so used as aforesaid, by the route aforesaid, from the said highway into the said adjoining tenements and back again, was necessary for the obtaining access to, and for the enjoyment of, the said adjoining tenements under and according to the said bequest thereof to the said *Abraham Pearson*, and was the most convenient and the most reasonably fit way in that behalf: and, after the death of the said testator, and after the said *John Pearson* attained his age of twenty-eight years, and the said executors had assented to the said bequest to him and the said *Abraham Pearson*, and he had become, and when he was possessed of the closes in the declaration mentioned for the residue of the said

term under the said bequest, and before the said *Abraham Pearson* attained his age of twenty-one years, and while the said adjoining tenements were vested in the said executors, as such executors, for all the residue of the said term of 999 years, and before the said time when &c., the said *John Pearson* and the said executors, by agreement, assented to and adopted the said way so used by the said testator as aforesaid as the way which thereafter should be the way to and from the said adjoining tenements; by means whereof the said *Abraham*, when he came to his said age of twenty-one years, became and was possessed of the said adjoining tenements, with a right to the same way thereto and therefrom, from and to the said highway, as was used by the said testator as aforesaid, for all the residue of the said term of 999 years which is yet in full force and unexpired: and the said *Abraham Pearson* afterwards, and before the said time when &c., by deed, assigned to *Joseph Harrison* the said adjoining tenements, with the said right of way, for all the residue of the said term of 999 years; who afterwards, and before the said time when &c., demised the said adjoining tenements, with the said right of way, to one *James Brearley* for a term which is not yet expired. And the defendant says that the trespasses herein pleaded to were users of the said right of way, and were committed by the defendant as and being the servant of the said *James Brearley*, and by his command, during the continuance of the said demise to the said *James Brearley*."

"And for a ninth plea, as to all the trespasses, the defendant says that, before the time of the committing the same trespasses, and before the plaintiff was possessed of or had any interest in the said closes, or either of them, one *James Pearson*, during his lifetime, and at the

1861.

 PEARSON
 v.
 SPENCER.

1861.
PEARSON
V.
SPENCER.

time of his decease, was possessed of and entitled to the residue of a then current term of 999 years, created by an indenture of lease, dated the 15th *January* A.D. 1663, as well of and in the said closes in the declaration mentioned as of and in a certain other farm, buildings, land and premises adjoining to the said closes of the plaintiff, and hereinafter called the adjoining tenements: and the defendant says that the said testator *James Pearson*, in his lifetime, before and at the time of making the said will, and thence until and at the time of his death, was entitled to and had and used a right of way from and out of a certain highway towards, unto and into the said close called *The Great Ing*, and back again, from and out of the close called the *The Great Ing*, towards, unto and into the said highway, for himself and his tenants, occupiers of the said several tenements so bequeathed to the said *Abraham* and *John Pearson* as hereafter mentioned, and for his and their servants on foot, and with cattle, carts and carriages, every year, at all times of the year, for all the residue and remainder then to come of the said term of 999 years, for the convenient occupation and enjoyment of the said closes in the declaration mentioned. And the defendant further says that, at the time of the making of the will herein mentioned, and thence until and at the time of the death of the said *James Pearson*, there was no way for cattle or carriages from any highway towards and to the said adjoining tenements without passing over the said closes in the declaration mentioned, or some or one of them, and that the said testator, in his lifetime, before and at the time when he made his will, and thence until and at the time of his death, was in the habit of using, as the way to and from the said adjoining tenements, the said way from and out of

the said highway towards, unto and into the said close called *The Great Ing*, and from the said place where the said way so entered the said close called *The Great Ing*, a way through, over and along the said close called *The Great Ing* towards, unto, into, through and over the said closes called *The Fold* and *Back of House Field*, towards, unto and into the said adjoining tenements, and thence by the same route back again to the place where the said first mentioned way joined the said close called *The Great Ing*, and from thence towards, unto and into the said highway: and the said *James Pearson*, being so possessed and entitled as aforesaid, before the 1st *January*, 1838, made his last will and testament in writing, whereby, amongst other things, he bequeathed to his son *Abraham*, as soon as he should attain the age of twenty-one years, and to his &c., the said adjoining tenements, with a right to the way so used by the testator as aforesaid, for and during all the residue of the said term of 999 years, subject to a moiety of the rent payable thereout under the said indenture of lease; and the said testator also by his said will bequeathed unto his son *John*, as soon as he should attain the age of twenty-eight years, and to his &c., the said closes in the declaration mentioned, for and during all the residue of the said term of 999 years, subject to the other moiety of the said rent. And the said testator, by his said last will, appointed *J. Mortimer* and *J. Robertshaw* joint executors of his said will; and afterwards, to wit on the 28th *March*, 1826, the said testator being then still so possessed and entitled as aforesaid, died, without having revoked or otherwise altered his said will" (here followed an averment of proof of the will, as in the

1861.

 PEARSON
v.
SPENCER.

1861.

PEARSON
V.
SPENCER.

previous plea), " which said executors afterwards, and before the said time when &c., and before the last mentioned closes were the plaintiff's, and before the plaintiff had any interest therein, duly assented to the said bequests; and, after the death of the said testator, the said *Abraham Pearson* attained his age of twenty-one years, by means whereof he became and was possessed of the said adjoining tenements, with a right to the same way thereto and therefrom, from and to the said highway, as was used by the said testator as aforesaid, for all the residue of the said term of 999 years, which is yet in full force and unexpired: and the said *Abraham Pearson* afterwards, and before the said time when &c., by deed, assigned to *Joseph Harrison* the said adjoining tenements, with the said right of way, for all the residue of the said term of 999 years; who afterwards, and before the said time when &c., demised the said adjoining tenements, with the said right of way, to one *James Brearley* for a term which is not yet expired. And the defendant says that the trespasses herein pleaded to were users of the said right of way, and were committed by the defendant as and being the servant of the said *James Brearley*, and by his command, during the continuance of the said demise to the said *James Brearley*."

Issue on all the pleas.

The case was tried, before *Keating J.*, at the *York Spring Assizes* in 1861, when a verdict was given for the plaintiff on all the issues, leave being reserved to the defendant to move to enter a verdict on the eighth and ninth pleas.

Bliss, in *Easter Term*, obtained a rule accordingly, and also for a new trial.

This rule was argued at the present Sittings, on the

26th June ; before WIGHTMAN and BLACKBURN JJ.,
CROMPTON J. being present part of the time.

1861.

PEARSON
v.
SPENCER.

Mellish shewed cause, and

Bliss and *Quain* were heard in support of the rule.

The essential facts in the case, as well as the arguments of counsel, fully appear in the judgment of the Court.

The following books were cited during the argument ;
Gale on Easements, pp. 48, 71, 78, 843-4 ; 2 *Rol. Abr.* 60, *Graunts Z.*, pl. 17 ; *Jorden v. Atwood* (a) ; *Beaudeley v. Brook* (b) ; *Oldfield's Case* (c) ; *Packer v. Welsted* (d), *Morris v. Edgington* (e) ; *Holmes v. Goring* (f) ; *Barlow v. Rhodes* (g) ; *James v. Plant, in error* (h) ; *Pheysey v. Vicary* (i) ; *Pinnington v. Galland* (k) ; *Proctor v. Hodgson* (l) ; *Lovell v. Smith* (m) ; *Worthington v. Gimson* (n).

Cur. adv. vult.

The judgment of the Court was now delivered by

BLACKBURN J. In this case the question at the trial was, whether the defendant had a right of way over the locus in quo, which he claimed in different manners. The eighth plea claimed the way on the ground that *James Pearson*, who was possessed of the locus in quo and also of the defendant's premises thereto adjoining, bequeathed the latter to *Abraham Pearson*, and the

(a) *Owen*, 121.

(c) *Noy*, 123.

(e) 3 *Taunt.* 24.

(g) 1 *Cr. & M.* 439.

(i) 16 *M. & W.* 484.

(l) 10 *Exch.* 824. 828.

(b) *Cro. Jac.* 189.

(d) 2 *Sid.* 39. 111.

(f) 2 *Bing.* 76.

(h) 4 *A. & E.* 749.

(k) 9 *Exch.* 1.

(m) 3 *C. B. N. S.* 120

(n) 29 *L. J. Q. B.* 116 ; 6 *Jurist N. S.* 1053.

1861.

PEARSON
v.
SPENCER.

locus in quo and other tenements to *John Pearson*; that the only access to the premises bequeathed to *Abraham* was over the premises bequeathed to *John*: and, no way being bequeathed in terms in the will, the executors of *James* and *John Pearson* set out the way claimed as the way to *Abraham's* premises. The ninth plea claimed the way as, in legal effect, bequeathed in the will of *James Pearson*. The verdict passed for the plaintiff on all the issues. Leave was reserved to enter a verdict for the defendant on the eighth and ninth pleas, on the undisputed facts, and the findings of the jury. Mr. *Bliss* obtained a rule to enter the verdict pursuant to the leave reserved, and also for a new trial on the ground of misdirection, and that the verdict was against evidence. We do not think that any misdirection was made out, nor that the verdict ought to be disturbed as against the evidence; but as we think that the defendant is entitled to have the verdict entered for him on the ninth plea, though not on the eighth, it is unnecessary to state the facts bearing on the other grounds in the rule.

It appeared in evidence on the trial that the plaintiff's farm, including the locus in quo, and the defendant's farm were contiguous. They formerly formed one farm called *Upper Isle*, which belonged to *James Pearson*, from whom both the plaintiff and the defendant claimed title, who was possessed of it for a term of 999 years. In 1825 one *Feathers* occupied, under *James Pearson*, the farm-house and buildings, and seven fields, forming part of *Upper Isle*, and which now form the defendant's farm; the rest of *Upper Isle*, which now forms the plaintiff's farm, *James Pearson* retained in his own occupation. The fields occupied by *Feathers* were sur-

rounded by the lands of other persons, except on the side where they abutted on the lands which were retained in *James Pearson's* hands. The access to the farm-house and the fields in *Feathers's* possession at that time was by a farm-road. The line of this road, after quitting the highway, passed through fields retained in the occupation of *James Pearson*, till it reached one of the fields in the occupation of *Feathers*, at a place called *Cod Bridge*: it did not there actually enter *Feathers's* holding, but after skirting it for a short distance, so that there was only the fence between the farm-road and *Feathers's* field, it re-entered a close in the occupation of *James Pearson* called the *Fold Yard*, and then entered the farm-yard of the house occupied by *Feathers*. This being the state of things in 1825, *James Pearson* made his will, and by it he bequeathed, inter alia, to his son *Abraham*, "all those leasehold premises situate at *Upper Isle*, now in the occupation of *George Feathers*, and consisting of a messuage, barn, stable, and other outbuildings, and all those seven closes of land," (naming them) "or by whatsoever other names called or known, for and during all the residue of a certain term of 999 years therein created by a certain indenture bearing date the 15th *January*, 1663, subject to a moiety or half part of the rent thereby made payable thereout;" and to his son *John* he bequeathed, as soon as he attained the age of twenty-eight years, and to his executors, administrators, and assigns, all the residue of his leasehold premises at *Upper Isle* aforesaid, consisting of all those five closes (naming them), "for and during all the residue of the said term of 999 years, subject to the other moiety of the rent made payable thereout." The will makes no mention of any ways whatsoever. The testator died in

1861.

 PEARSON
 v.
 SPENCER.

1861.

PEARSON
v.
SPENCER.

1826 *John Pearson*, his son, who was the plaintiff, attained the age of twenty-eight years in 1833, and was put in possession by the executors, so that from that time the farm bequeathed to the plaintiff was held separate from that bequeathed to *Abraham Pearson*. The defendant derived title through *Abraham Pearson*.

It was not disputed, either at the trial or on the argument before us, that inasmuch as the portion of the farm bequeathed to *Abraham* was surrounded by the property of third persons, so that there was no access to it at all except by crossing the other property of the testator, which he bequeathed to *John Pearson*, some way of necessity must be given over *John Pearson's* farm ; but the great dispute was, what that way was to be. The plaintiff conceded that the defendant had a right to use the farm-road until it came to *Cod Bridge*, but contended that when he reached that point where the road was only separated from the defendant's farm by a fence, the defendant ought to pass through the fence into his own field, and after that, to adopt the language of the plaintiff as a witness, the defendant was to "road himself." The issues joined were as to the right of way after passing *Cod Bridge* through the *Fold Yard*. It appeared in evidence that when the plaintiff came of age in 1833, and was put in possession by the executors, they remained in possession of *Abraham's* farm and continued to use the old road as it had been used in the testator's time by *Feathers* ; but the jury have found that this was in consequence of an arrangement to delay settling what the road should permanently be until *Abraham* came of age. *Abraham* came of age in 1842, less than twenty years before the commencement of this action. There was contradictory evidence as to what

happened then; but it must be taken that the jury believed the plaintiff's version, which was that he told *Abraham* that he must "road himself" from *Cod Bridge*, and that *Abraham* assented, only asking for time to do so. We think that this finding disproves the averment that the executors and *John Pearson* set out the way over the locus in quo, which we think a material part of the eighth plea. It is not necessary, in the view we take of the case, to notice the rest of the evidence, which was very contradictory. The jury found, in answer to questions put by the Judge, that the *Fold Way* was a convenient way, but that it was not a necessary way; by which we think we must understand them to mean that the defendant's farm could be occupied without using the road further than *Cod Bridge*; and they further find that the testator, in fact, used the *Fold Way* up to the time of his death.

On the findings, we think that, by the will of *James Pearson*, a right to use the *Fold Way* was given to *Abraham* and his assigns; and, as nothing has since occurred to take away that right, the verdict on the ninth plea ought to be entered for the defendant.

We do not think that, on a severance of two tenements, any right to use ways, which during the unity of possession have been used and enjoyed in fact, passes to the owner of the dissevered tenement, unless there be something in the conveyance to shew an intention to create the right to use these ways de novo. We agree with what is said in *Worthington v. Gimson* (a), that in this respect there is a distinction between continuous easements, such as drains, &c., and discontinuous easements, such as a right of way; and *Pheysey v. Vicary* (b) is an authority

(a) 29 *L. J. Q. B.* 116; 6 *Jurist N. S.* 1053. (b) 16 *M. & W.* 484.

1861.

PEARSON

V.
SPENCER.

1861.

 PEARSON
 v
 SPENCER.

that the same rule in this respect applies to a will as to a deed. But when, as in the present case, property devised or granted is landlocked, and there is no other way of getting at it without being a trespasser, so that it cannot be enjoyed without a way of some sort over the lands of the testator or grantor, it is clear that a way of necessity is created *de novo*.

It seems to us settled by modern authority, that the ground on which the way of necessity is created is, that a convenient way is impliedly granted as a necessary incident. It is observed by *Parke B.*, in *Proctor v. Hodyson* (a), that the extent of the authority of *Holmes v. Goring* (b) is that, though it is a grant, it may be construed to be a grant of such a right of way as from time to time may be necessary. He adds, "I should have thought it meant as much a grant for ever as if expressly inserted in a deed, and it struck me at the time that the Court was wrong." We certainly do not feel inclined to extend the authority of *Holmes v. Goring* (b) so far as to hold that the person into whose possession the servient tenement comes, may from time to time vary the direction of the way of necessity, at his pleasure, so long as he substitutes a convenient way. We think we must hold that the way of necessity, once created, must remain the same way as long as it continues at all. The extraneous facts, therefore, shew that by this devise the testator did intend to create a convenient way of some sort, which, once set out, would continue; but there is a singular absence of authority as to the manner in which it is to be ascertained what is to be the direction of the convenient way thus created. In 2 *Rolle's Abridgment*, p. 60, "*Graunts*," Z., pl. 17, it is said that the feoffor who

(a) 10 *Exch.* 824. 828.(b) 2 *Bing.* 76.

grants the landlocked land, and retains the other, which thus becomes the servient tenement, shall assign the way where it is most convenient to himself. *Packer v. Welsted* (a) was a case where the grantor retained the landlocked tenement, which became the dominant tenement; it is said that he should take a way, and the law should adjudge if it was a convenient way. In each case it seems to have been thought that the person by whose act the way was created was subsequently to select the way, subject only to this, that it should be a convenient way. In the case of a devise it is impossible for the testator, by whose act the way is created, and who is dead, to do any subsequent act of selection; and if the line of the way depends on his intention, it must be discovered from the language of the will, understood with reference to the state of the property.

It might be very difficult to state how the way was to be set out, if the premises before severance were so occupied as to afford no indication of what was the usual way in the testator's time, but this can rarely be the case in practice. In general, especially when, as in the present case, there was an occupation by a tenant, there must be an actual existing way by which the premises were used and enjoyed; and we think we best effectuate the intention of the testator by construing the implied grant of a way to be a grant of that way actually used at the time; and that in this case clearly was the *Fold Way* used by the tenant at the time the will was made, and by the testator up to his death. We cannot find this principle stated in terms as the ground of decision in any case. It will support that part of the decision in

1861.

 PEARSON
v.
SPENCER.

(a) 2 Sid. 39. 111.

1861.
PEARSON
V.
SPENCER.

Pinnington v. Galland (a) which determined the particular line of way in that case, but it certainly is not there expressed as the reason of the decision. But we find no case inconsistent with the rule, which seems to us founded on principle and convenient.

We therefore think we must consider the rights of the parties the same as if the implied devise of a way of necessity to *Abraham Pearson* had been an express devise of that necessary way which at the time was actually used with the premises. If this be a correct view of the case the ninth plea is proved, and the eighth and other issues are properly found for the plaintiff. The rule, therefore, will be absolute to enter the verdict for the defendant on the ninth plea only.

This is the judgment of my brother *Wightman* and myself. My brother *Crompton*, who did not hear the whole argument, authorizes me to say that, so far as he heard the case, he entertained the same opinion.

Rule absolute to enter a verdict for the
defendant on the ninth plea.

(a) 9 *Esch.* 1.

1861.

SIKES *against* WILD and others.Wednesday,
July 9th.*Abortive sale
of real estate.
Tilla.
Damages.*

Real estate had been devised to the defendant in trust to sell, who put a part of it up for sale, which the plaintiff agreed to buy, and was accepted as the purchaser. The defendant was aware that he could not make a title free from incumbrance, as by a marriage settlement the land was vested in trustees to secure an annuity to the widow of the devisor, but he had obtained from her a parol promise that in the event of the sale she would transfer her security to another property. After the sale the widow refused to assent to this, and the bargain went off in consequence. In an action by the plaintiff against the defendant for not completing the bargain, the jury found that the defendant *bonâ fide* believed that he would be able to make to the purchaser a good title free from incumbrance, and that he had reasonable grounds for so believing:

1. Held, that the plaintiff, although entitled to recover his deposit and the expences of investigating the title, was not entitled to recover damages for the loss of his bargain: per *Wightman* and *Blackburn JJ.*, dissentiente *Cockburn C. J.*

2. Concessum, on the authority of *Pounsett v. Fuller*, 17 C. B. 660, that the expences attendant on an attempt which was made, after the bargain was off, to enter into a fresh arrangement could not be recovered.

THE first count of the declaration alleged that the defendants put up for sale certain land as unincumbered, on the faith of which the plaintiff bid for it, and was declared the purchaser, and paid a deposit; but it was afterwards found to be incumbered with an annuity, whereby a good title could not be made, and the sale and purchase could not be completed, &c.

The second count was to the same effect, alleging that the defendants fraudulently and deceitfully stated and pretended the land to be unincumbered.

To the first count the defendants pleaded payment of 150*l.* into Court, and to the second Not guilty.

The plaintiff replied that the sum paid into Court was not sufficient; and took issue on the other plea.

On the trial, before *Cockburn C. J.*, at the *Leicestershire* Spring Assizes in 1861, it appeared that the land in question consisted of a farm, which was part of an

1861:

SIKES

V.
WILD.

estate that had been devised to the defendants in trust to sell as soon as they conveniently could. The solicitor employed in the affairs of the trust was aware that the devisor held the estate subject to a settlement, by which the legal estate was in trustees for the purpose of securing a life annuity to the widow of the devisor, and he knew that no title, free of incumbrances, could be made to any part of the estate, unless that lady and her trustees agreed to discharge the part sold from the trust to secure the annuity. He had represented to the lady that it would be for the benefit of the family that the farm in question should be sold, and that it would not be disadvantageous to herself if, in case of a sale, she would consent to transfer her security to another property, whilst it would benefit the estate. She was satisfied that this was so, and verbally expressed her concurrence. After this the farm was put up for sale, and the plaintiff agreed to buy it, and was accepted as the purchaser. The solicitor also knew that the lady was not legally or equitably bound by her parol consent, and consequently that the power of the defendants to make a good title to the farm, free of incumbrances, was precarious, in so far as it depended on her continuing in the same mind. Such proved not to be the case: for she was persuaded by other friends of the family to refuse her assent, and the bargain went off; and a subsequent attempt to make a fresh arrangement proved abortive. It was agreed that the costs incurred in the investigation of the title should be referred for taxation.

The Lord Chief Justice left it to the jury to say:

1. If the defendants bonâ fide believed that they would be able to make to the purchaser a good title, free from incumbrance; 2. If they had reasonable grounds for

so believing: both which questions the jury answered in the affirmative. He also left it to them to assess the damages generally, which they did; and a verdict was entered for the plaintiff for the amount, with leave reserved to the defendants to move to reduce the damages, or enter a verdict for the defendants if, after the taxation, the money paid into Court proved sufficient to cover the expences of investigating the title and the deposit, unless the plaintiff, under the peculiar circumstances, was entitled to general damages.

On the taxation, the amount paid into Court proved to be sufficient to cover all the expences, except some attendant on the abortive attempt to make a fresh arrangement after the bargain was off.

Macaulay, in the following Term, obtained a rule to enter a verdict for the defendants on the grounds: 1. That the plaintiff was not entitled to damages as and for the loss of a saleable bargain, the jury having found that the defendants acted bonâ fide and had reasonable grounds to suppose they could make a good title. 2. That the amount paid into Court equalled or exceeded the amount of the deposit money, and such portion of the charges of the plaintiff's solicitor as were recoverable in the present action.

At the present Sittings, on the 18th *June*; before *Cockburn C. J.*, *Wightman* and *Blackburn JJ.*

Mellor and *Field* shewed cause, and *Hayes* Serjt. and *Bristowe* were heard in support of the rule.

The arguments on both sides fully appear in the judgments of the Judges: it will be sufficient to add that the following authorities were referred to by the bar or

1861.

SIKES

V.
WILD.

1861. the bench during the argument; *Flureau v. Thornhill* (a);
 SIKES *Johnson v. Johnson* (b); *Bratt v. Ellis* (c); *Jones v.*
 v. *Dyke* (d); *Hopkins v. Grazebrook* (e); *Walker v. Moore* (f);
 WILD. *Robinson v. Harman* (g); *Pounsett v. Fuller* (h); *Hadley*
v. Bazendale (i); *Cornfoot v. Fowke* (k); *Sugden's Vend.*
and Purch., p. 301, 13th ed.

Cur. adv. vult.

BLACKBURN J., sitting alone, now stated that the Judges, differing in opinion, had prepared separate judgments, which he should read. He accordingly read the following judgments.

BLACKBURN J. In this case the plaintiff purchased from the defendants a farm; the defendants proved unable to make a good title. The plaintiff brought this action against them for not doing so. The defendants paid money into Court: and the question is, on what principle the damages should be estimated. (After fully stating the facts his Lordship proceeded.)

It was properly admitted on the argument that the case of *Pounsett v. Fuller* (h) conclusively decided that the expenses attendant on the attempt to make a fresh arrangement after the bargain was off could not be claimed. The question, therefore, which was argued before us was whether, under the circumstances, the plaintiff could claim damages for the loss of his bargain. I am of opinion that there is nothing in this case to take it out

(a) 2 W. Bl. 1078.

(b) 3 B. & P. 162.

(c) *Sugd. V. & P. App. 7*: i. e. the 11th and some other editions.

(d) *Id.* 8.

(e) 6 B. & C. 31.

(f) 10 B. & C. 416.

(g) 1 Exch. 850.

(h) 17 C. B. 660.

(i) 9 Exch. 341.

(k) 6 M. & W. 358.

of the general rule as to the assessment of damages for the breach of a contract to sell real property where the bargain goes off on account of a defect in the title.

1861.

Sikes

V.
WILK.

That rule, which is an exception from the general rule of common law, was first laid down in *Flureau v. Thornhill* (a), as long ago as 1776. It was constantly acted upon until the case of *Hopkins v. Grazebrook* (b) (which introduced an exception in cases where the vendor was not in possession, on which I shall observe presently). It was again acted upon in *Walker v. Moore* (c), where *Parke J.* puts the rule upon what I take to be the true ground, namely, that it is implied from the usage of this particular business. He says, p. 422, "a jury ought not, in the case of a vendor in possession, to give any other damages in consequence of a defect being found in the title than those which were allowed in *Flureau v. Thornhill*, which was recognised in *Johnson v. Johnson* (d), *Brutt v. Ellis* (e), and *Jones v. Dyke* (f). In the absence of any express stipulation about it, the parties must be considered as content that the damages, in the event of the title proving defective, shall be measured in the ordinary way, and that excludes the claim of damages on account of the supposed goodness of the bargain."

In the more recent case of *Robinson v. Harman* (g), the general rule was recognised, but the exception in

(a) 2 W. Bl. 1078.

(b) 6 B. & C. 31.

(c) 10 B. & C. 416.

(d) 3 B. & P. 162. *Flureau v. Thornhill* does not appear to have been cited by name in *Johnson v. Johnson*.(e) *Sugd. V. & P. App.* 7; i. e. the 11th and some other editions.(f) *Ib.* 8.(g) 1 *Exch.* 850.

1861. *Hopkins v. Grazebrook* (a) was acted upon. In the last case on the subject,—*Tounsett v. Fuller* (b),—the cases of *Hopkins v. Grazebrook*, and *Robinson v. Harman* (c), were expressly recognised as binding authorities; but the Court of Common Pleas considered the general rule applicable under such circumstances as leaves it very difficult to say to what cases, if any, the exception supposed to be established by *Hopkins v. Grazebrook* still applies. In the present case, however, it is enough to say that, giving the two cases of *Hopkins v. Grazebrook* and *Robinson v. Harman* their fullest effect, the exception established by them is one within which the present case does not fall.

SIKES
v.
WILD.

Hopkins v. Grazebrook was moved in *Michaelmas* Term, 1826. The facts were that *Hill & Co.* had agreed to sell real estate to one *Harewood*, and *Harewood* had agreed to sell it to the defendant, who again agreed to sell it to the plaintiff. In consequence of disputes between *Hill* and *Harewood* the defendant could not complete his title. It was admitted that the defendant had acted *bonâ fide*; but according to the views as to the law relating to public policy which Lord *Tenterden* then entertained (which were not finally shewn to be erroneous till after his death, in *Hibblewhite v. M'Morine* (d)), the defendant had acted improperly and in violation of law. It was only in the preceding Sittings after *Easter* Term of the same year, that in *Bryan v. Lewis* (e) Lord *Tenterden* expressed, in the strongest terms, an opinion which he declared he should always entertain till told by the House of Lords he was

(a) 6 B. & C. 31.

(b) 17 C. B. 660.

(c) 1 Exch. 860.

(d) 5 M. & W. 462.

(e) Ry. & M. 386.

wrong, that any speculative contract to sell things not in possession was illegal and void, as against the policy of the law. It is upon this ground it seems to me that in *Hopkins v. Grazebrook* (a), p. 33, he makes the case an exception, because the defendant had entered into a contract to sell "without the power to confer even the shadow of a title." Bayley J., as reported, p. 34, says, "The case of *Flureau v. Thornhill* (b) is very different from this, for here the vendor had nothing but an equitable title." If this was the ground for the decision it is clearly untenable, and is inconsistent with the last decision in *Pounsett v. Fuller* (c); but in *Walker v. Moore* (d) Bayley J. says, p. 420, that in *Hopkins v. Grazebrook* the Court was of opinion that the defendant was "in fault by representing himself as the owner of the property" when he was not so. *Littledale J.*, who had been one of the Judges in *Hopkins v. Grazebrook*, but whose reasons are not there reported, says, in *Walker v. Moore*, p. 422, "it seems to me to be contrary to the policy of the law, that a man should offer an estate for sale before he has obtained possession and a conveyance." Parke J., in the judgment already quoted, tacitly assumes that this had been the ground of the decision in *Hopkins v. Grazebrook*, as in enunciating the general rule on which he acts he confines it to the case of a vendor *in possession*.

In *Robinson v. Harman* (e) the vendor had, with the object of bringing about the bargain, expressly stated that, under his father's will, the property was his out and out. In fact, it had been devised to trustees to pay the defendant a moiety of the rent during his life only. If the defendant knew this he was guilty of a fraud ;

1861.

 SIKES
v.
WILD.

(a) 6 B. & C. 31.

(b) 2 W. Bl. 1078.

(c) 17 C. B. 660.

(d) 10 B. & C. 416.

(e) 1 Exch. 850.

1861.

SIXES

V.
WILD.

if he was ignorant of it, the transaction must have been so recently after his father's death that the will had not yet been acted upon, and he was not in possession ; for, if he had been in possession, he could not be ignorant that he only got half the rents. The report leaves it uncertain how the facts were as to this ; and the judgment merely being that the case was not distinguishable from *Hopkins v. Grazebrook* (a), leaves it uncertain whether the Court thought the exception in question was when there was misconduct, or want of possession, or a want of legal title. In *Pounsett v. Fuller* (b) the Court of Common Pleas expressly held that the mere want of legal title does not bring the case within the exception in *Hopkins v. Grazebrook*, which they all seem to consider as depending upon misconduct. My brother *Williams* expresses doubts, in which I fully sympathize, as to the soundness of the exception in *Hopkins v. Grazebrook* in any point of view. I do not see how the existence of misconduct can alter the rule by which the damages for the breach of a contract are to be assessed : it may render the contract voidable on the ground of fraud, or give a cause of action for deceit, but surely it cannot alter the effect of the contract itself. And if it be said that the rule depends upon an implied condition resulting from the general understanding of vendors and purchasers (which is the ground taken by *Parke J.* in *Moore v. Walker* (c), and I think the true one), and that the usage is such that this implied condition excludes such cases as *Hopkins v. Grazebrook*, I think that it will be worthy of the consideration of any Court competent to review that case, whether the strong opinion of Lord *St. Leonards*, repeated in his

(a) 6 B. & C. 31.

(b) 17 Com. B. 660.

(c) 10 B. & C. 420.

13th edition of *Vendors and Purchasers*, p. 301, does not shew that the general understanding of conveyancers has been misapprehended.

1861.

 SIKES
v.
WILD.

However, it is enough for the decision of the case before us that it is not brought within that exception, however it is understood. The defendants here were not out of possession, nor were they entirely without title. The only ground for imputing misconduct in them was that though they knew that their power of making a title free from incumbrances was precarious, as depending on the stability of the lady's mind, they nevertheless put up the property for sale; but the jury have found that this was done *bonâ fide* and done reasonably, and it is impossible, I think, to say as a matter of law that there is misconduct in putting property up to sale without disclosing every material fact, as if it was a case of marine insurance. And lastly, though the defendants had not the complete legal title at the time they put the property up for sale, *Pounsett v. Fuller* (a) is a distinct authority that in the absence of misconduct that does not bring the case within the exception.

I am, therefore, of opinion that the rule must be made absolute, and in this judgment my brother WIGHTMAN concurs.

COCKBURN C. J. I regret that I am unable to concur with my learned brothers in holding that this rule should be made absolute in favour of the defendants. I cannot bring myself to think that the immunity which the law allows to a party contracting to sell real estate in the event of his being unable to make out a title, from all liability on the breach of his contract beyond the ex-

(a) 17 Com. B. 660.

1861.

SIKES

V.
WILD.

penses incurred in investigating the title, can properly be extended to a case like the present.

That immunity is in itself an anomaly. It probably had its origin in the difficulty in which, in the complicated and highly artificial state of our law relating to real property, an owner of real estate having contracted to sell is too frequently placed from not being able to make out a title such as a purchaser would be bound or willing to take. The hardship which would be imposed on a *bonâ fide* vendor if, upon some legal flaw appearing in his title, he were held liable in all the consequences which would attach upon a breach of contract relating to personalty, and the difficulty which might be thrown in the way of bringing real property into the market if the full liability attached in such a case, have probably, by an understanding and usage among those engaged in the transfer of estates, led to this exception to the general law. But I can see no reason, in the absence of authority, for extending the exception to parties who, knowing that they have not any present estate to convey, take upon themselves to sell, in the speculative belief that they will be able to procure an interest and title before they are called upon to execute the conveyance. There is an obvious difference between an owner who knows that he alone is entitled to an estate and has a right to sell it, although he may fail to make out a sufficient title, and a person who, not having the estate, takes upon him to sell on the expectation of acquiring the estate in time and making out a title. The cases of *Hopkins v. Grazebrook* (a) and *Robinson v. Harman* (b) are direct authorities for saying that a person disposing of real estate to which he has no present

(a) 6 B. & C. 31.

(b) 1 Exch. 850.

right, although under a bonâ fide belief that the right will be acquired in time to fulfil the contract, will be liable to the full extent. These cases appear to me to be directly in point. Their authority does not appear to have been shaken by the decision of the Court of Common Pleas in *Pounsett v. Fuller (a)*. For although in that case the defendant, who was held not to be liable in the full extent of damages, had been unable to fulfil his contract in consequence of not having the legal estate, he was in possession and had an equitable interest, and believed himself under the circumstances to be in a condition to convey according to his agreement.

But the present defendants knew themselves to have neither the legal nor the equitable estate in the land which they contracted to sell to the plaintiff. They were trustees under a devise which was inoperative, in consequence of the land of which the deviser had taken upon himself to dispose being vested in trustees under a settlement. They knew that, without the consent of the cestui que trust (the testator's widow) and her trustees to abandon the settlement, and their concurrence in the sale, they the defendants had no right or power to convey the land; and though it is true they had obtained the assent of the cestui que trust, and had every reason to believe that that assent would not be revoked, and that the trustees under the settlement would concur in the sale, they equally knew that none of those parties were under any obligation, legal or equitable, to join in the conveyance, while without them no title could possibly be made. They were, therefore, contracting to sell at a time when they knew they had no power to sell, and no more than the expectation of making out a title. The

1861.

SIXES

V.
WILD.

(a) 17 C. B. 660.

1861.

SIKES

v.

WILD.

case appears to me not within the rule as settled in *Flureau v. Thornhill* (a), but within the exception engrafted on that rule as established by the cases of *Hopkins v. Grazebrook* (b) and *Robinson v. Harman* (c), to which I have before referred.

In my opinion, therefore, the plaintiff is entitled to the damages assessed by the jury in respect of the loss he has sustained by the non-completion of the sale.

Rule absolute.

(a) 2 *W. Bl.* 1078.

(b) 6 *B. & C.* 31.

(c) 1 *Exch.* 850.

[Wednesday,
February 13th,
1861.]

The IRISH PEAT COMPANY *against* PHILLIPS.

*Company
incorporated
by charter.
Deed of settle-
ment.
Shareholder.
Letter of
allotment.
Signing of
deed.
Register.
Numbering
of shares.
Calls.
Action.*

The declaration stated that the defendant was the holder of fifty shares in the plaintiffs' Company, and indebted in respect of seven calls, whereby an action had accrued to the plaintiffs against him under and by virtue of their deed of settlement. Pleas. 1. Never indebted. 2. That the defendant was not the holder of the shares. 3. That the deed was not his deed. Replication to the third plea, setting out the charter of incorporation, whereby Her Majesty willed that the capital should be 120,000*l.* divided into 6000 shares: that all the proprietors of the stock of the corporation should execute a deed of settlement whereby the capital should be divided into those shares, to be numbered in regular succession, beginning with 1, and whereby they should enter into covenants for payment of the sums subscribed by them when called for: that such a deed was executed (various clauses were set forth), and that the defendant was a shareholder and had paid certain calls. Before the charter was granted the brokers to the Company put down the name of the defendant, without his authority, as an applicant for shares, and the promoters allotted to him fifty shares, and sent an allotment letter informing him thereof, and requiring a deposit of 1*l.* per share, adding, "and on your execution of the deed prepared in conformity with the provisions of the Royal charter, you will be entitled to fifty share certificates of the Company." The defendant paid the deposit of 1*l.* a share. The charter was afterwards granted, and the deed prepared and executed by many shareholders, but not by the defendant. In the deed were the following clauses, which were substantially the same as those contained in The Companies Clauses Consolidation Act, 1845, 8 & 9 *Vict.* c. 16. :—3. The shares shall be numbered in regular succession, beginning with 1; and every share

shall be distinguished by its separate number.—5. Every person who shall have subscribed the prescribed sum to the capital, or shall otherwise have become entitled to a share of the same, and whose name shall have been entered on the register of shareholders, shall be deemed a shareholder.—6. The corporation shall keep a book to be called "The Register of Shareholders," in which shall be entered the names of the persons entitled to shares, together with the number of shares to which such persons are entitled, distinguishing each share by its number, and the amount of instalments paid on such share.—8. A certificate of ownership, under the corporation seal, shall be delivered to each shareholder; and such certificate shall specify the share in the undertaking to which such shareholder is entitled.—65. In an action for calls, it shall be sufficient to declare that the defendant is owner of one share or more "(stating the number of shares)," and is indebted in respect of one call or more, whereby an action hath accrued to the corporation by virtue of the deed.—66. On the trial it shall be sufficient to prove that the defendant, at the time of the call, was a holder of one share or more.—It was represented by the prospectus issued shortly before the date of the charter, and by the letter of allotment, that no more than three calls should be made until the Company's works should be in operation. The defendant had paid four calls, but refused to pay the calls in question.

1. Held by this Court, and affirmed by the Exchequer Chamber, that shares were not created so as to make the alleged owner liable to calls.

2. Held, by the Exchequer Chamber, that the defendant was not a shareholder, as he had not executed the deed of settlement.

3. *Seemle*, that after acceptance of the shares and payment of the calls, especially the call made after those specified in the prospectus and letter of allotment, and the correspondence in which he was treated as a holder of shares, and as he knew of the existence of the charter and the deed, the defendant could not say, as against the other shareholders and the Company, that he was not a shareholder by reason of the stipulations in the prospectus and letter of allotment not having been carried out.

1861.

IRISH PEAT
Company
v.
PHILLIPS.

THIS was an action to recover 692*l.* 0*s.* 11*d.*, alleged to be due from the defendant to the plaintiffs for calls upon shares in the plaintiffs' Company of which the defendant was alleged to be the holder, and for interest upon the calls in arrear. By consent a case was stated for the opinion of the Court; the pleadings were to form part of the case.

The declaration stated that the defendant was the holder of fifty shares in *The Irish Peat Company*, and was indebted to the corporation in 600*l.*, in respect of seven calls upon each of the said fifty shares, whereby an action had accrued to the plaintiffs against the defendant under and by virtue of the deed of settlement of the

1861. *Irish Peat Company*, dated &c. There were also counts
 IRISH PEAT Company
 v.
 PHILLIPS. for interest, and on account stated.

Pleas (among others): 1. To the whole declaration, Never indebted. 2. To the first count, that the defendant was not at the times of the making of the calls the holder of the shares. 3. To the first count, that the deed of settlement was not his deed.

Replication to the third plea. That the plaintiffs were a corporation incorporated by Her Majesty's Royal charter of incorporation under the great seal of the United Kingdom, bearing date the 12th *April*, 1851; and by the said Royal charter Her Majesty (among other things) willed that the capital or joint-stock of the corporation to be used and applied in establishing and carrying on the undertaking, and for the purposes therein mentioned, should consist of the sum of 120,000*l.*, divided into 6,000 shares of 20*l.* each; and Her Majesty thereby further directed that *J. M., W. D. O., and J. W.*, and all other the proprietors for the time being of the stock of the said corporation, should, within six calendar months of the date of the said charter, enter into and execute a proper deed of copartnership and settlement, whereby the capital of the Company should be divided into the aforesaid number of shares, to be numbered in regular succession, beginning with 1, and whereby all the proprietors for the time being of the stock of the corporation should enter into proper covenants for the payment of the sums subscribed for by them respectively, and which should then remain unpaid, as and when the same should be called for by the Board of Directors having the management of the affairs of the corporation, and whereby provision should be made for the registration of the names of all the proprie-

tors of the corporation from time to time in proper books to be provided for that purpose, &c. And Her Majesty did thereby further declare that the several regulations to be contained in the said deed should be taken to be the existing regulations of the corporation excepting so far as the same might be varied or altered, or might be repugnant to the provisions of the said Royal charter, or to the laws and statutes of Her realm. Averment (among others), that the proprietors at the time being of the stock of the corporation did, within the time limited, enter into and execute a proper deed of settlement in accordance with and as directed by the Royal charter. [The replication then set forth the 5th, 6th, 63rd, 64th, and 65th clauses or regulations contained in the deed.] Averment, that at the time of the said calls being made and becoming payable, and of the commencement of this suit, the defendant was a shareholder of the corporation within the meaning of the first-mentioned clause or regulation, and had paid certain other instalments of, and calls upon, the said shares.

Issue thereon.

The Irish Peat Company are a corporation incorporated by Royal charter, dated the 12th *April*, 1851, for the manufacture and sale of the chemical products derived from the manufacture of peat. The charter, which either party was to be at liberty to refer to, as if it formed part of the case, contained, among others, a clause incorporating the Company; a clause directing that the Board of Directors, to be constituted as provided by the deed thereafter directed to be executed, should have power and authority, among other things, "to do all acts which they shall consider necessary for the well ordering of the affairs of the corporation, and to execute

1861.

IRISH PEAT
Company
v.
PHILLIPS.

1861.
IRISH PEAT
Company
v.
PHILLIPS.

all the powers, in relation to the said corporation, as if the same were done with the assent of the whole body, so far as the same be done in conformity to the provisions of these presents and of the deed hereinafter mentioned, or any supplemental deed." Also the following clauses or provisions :—

"And we will that the capital or joint stock of the corporation to be used and applied in establishing and carrying on the undertaking, and for the purposes aforesaid, shall consist of the sum of 120,000*l.* sterling, divided into 6,000 shares of 20*l.* each, and of such further sum not exceeding in the whole, with the said sum of 120,000*l.*, the sum of 300,000*l.*, as may be determined on by the shareholders of the said corporation at any special general meeting to be convened for the said purpose under the authority for that purpose to be contained in the deed.

"And we do hereby further direct that the sum of 60,000*l.* at the least of the original capital or stock of the said corporation shall be subscribed for within six calendar months from the date of these presents, and that 12,000*l.* of such sum of 60,000*l.* at the least shall be paid up within such period ; and that such subscription and payment of capital shall be in addition to any part of the capital which may be taken in payment for the purchase of the said patent right, according to the provisions of the deed to be executed as after mentioned.

"And we do hereby direct that the said *J. M.*, *W. D. O.* and *J. W.*, and all other the proprietors for the time being of the stock of the said corporation shall, within six calendar months from the date of these presents, enter into and execute a proper deed of copartnership and settlement, whereby the capital

of the said Company shall be divided into the aforesaid number of shares, to be numbered in regular succession, beginning with 1, upwards, and whereby all the proprietors for the time being of the stock of the said corporation shall enter into proper covenants for the payment of the sums subscribed for by them respectively, and which shall then remain unpaid, as and when the same shall be called for by the Board of Directors having the management of the affairs of the said corporation, and whereby provisions shall be made for the registration of the names of all the proprietors of the corporation from time to time in proper books to be provided for that purpose, and for the management of the affairs of the said corporation by a Board of Directors to be named first in the said deed, and thereafter to be elected by the shareholders in general meeting assembled as therein to be provided, and wherein shall be also inserted all such other clauses and provisions as may be usual and expedient in the like cases.

"And we do hereby further declare that the several regulations to be contained in the said deed or in any supplemental deed to be made and executed as in the said deed hereby directed to be entered into shall be provided, shall be taken to be the existing regulations of the said corporation, excepting so far as the same may be altered or varied, or may be repugnant to the provisions of this our Royal charter, or the laws and statutes of our realm.

"And further we hereby will and declare that in case the said corporation shall fail to enter into and execute such deed of settlement as aforesaid, and to deposit a copy thereof within the period before limited in that behalf, or in case such parts of the capital as is herein-

1861.

IRISH PEAT
Company
v.
PHILLIPS.

1861.
IRISH PEAT
Company
v.
PHILLIPS.

before provided for shall not be subscribed for and paid up respectively as is hereinbefore provided; or in case the said corporation shall not comply with all other the directions and conditions in these our letters patent contained; or in case the President of the said Board of Trade shall at any time report to us that the said corporation has departed from or is not fulfilling the purposes for which the same has been incorporated, it shall be lawful for us, our heirs and successors, by any writing under the great seal or under the sign manual of us, our heirs and successors, to revoke and make void this our Royal charter, and every clause, matter and thing therein contained, either absolutely or under such terms and conditions as we or they shall think fit."

The deed of copartnership and settlement regulating the Company (which either party was to be at liberty to refer to as if it formed part of the case) bore date the 8th *July* 1851, and contained (among others) the following articles or clauses.

"1. That the capital or joint stock of the corporation shall consist of the sum of 120,000*l.* sterling, divided into 6000 shares of 20*l.* each, and of such further sum not exceeding in the whole, with the said sum of 120,000*l.*, the sum of 300,000*l.*, as may be determined on by the shareholders as after mentioned.

"3. That the shares shall be numbered in regular succession, beginning with 1; and every share shall be distinguished by its separate number; and all shares in the capital stock of the corporation shall, in equity, as between the shareholders and their real and personal representatives, be considered as personal estate, and be transmissible as such.

"5. That every person who shall have subscribed the

prescribed sum or upwards to the capital of the corporation, or shall otherwise have become entitled to a share of the same, and whose name shall have been entered on the register of shareholders, shall be deemed a shareholder of the corporation.

"6. That the corporation shall keep a book to be called 'The Register of Shareholders,' in which shall be distinctly entered, from time to time, the names of the several corporations, and the names and addresses, titles, professions, trades or businesses of the several persons entitled to shares in the corporation, together with the number of shares to which such corporation, or such persons, shall be respectively entitled, distinguishing each share by its number, and the amount of instalments paid on such shares, and the surnames or corporate names of the said shareholders shall be placed in alphabetical order in an index to such book, and such book shall be authenticated by the common seal of the corporation being affixed thereto, and such authentication shall take place at the first annual general meeting, or at the next subsequent meeting of the corporation, and so from time to time at every annual general or next subsequent meeting; but in case at any time it shall happen that any authentication shall be required of such book in such urgency as to time as to make it inconvenient or injurious to the interests of the corporation to wait for the same being made at such annual general meeting, then it shall be lawful for the board to affix such seal, and to make such authentication of their own authority at any meeting of the board whereat not less than five members shall be present, and such authentication shall be valid and effectual to all intents and purposes; but such book shall be produced for authen-

1861.

IRISH PEAT
Company
v.
PHILLIPS.

1861.
IRISH PEAT
Company
v.
PHILLIPS.

tication, and be authenticated, at the next annual general or next subsequent meeting of the corporation in the same way as if such authentication by the council had not taken place, and the reasons for such special authentication shall be then stated or reported to such meeting.

"8. That a certificate of ownership (which may be in the form set forth in the Schedule A. to these presents), under the corporation seal, shall be delivered gratis to each shareholder, upon application for the same at the office of the secretary; and such certificate shall specify the share in the undertaking to which such shareholder is entitled; and, if such certificate shall be proved to be lost or destroyed, the council may grant a new one, or, if it shall be worn out or damaged, the board may order it to be cancelled, and grant a new one, and for each such substituted certificate the corporation may demand any sum not exceeding 2s.; and every such substituted certificate shall be entered by the secretary in the shareholders' register, and such certificate shall be *prima facie* evidence of the title of the shareholder, his executors, administrators, successors or assigns, to the share therein specified: nevertheless the want of such certificate shall not prevent the holder of any share from disposing thereof.

"9. That it shall be lawful for every shareholder and every person claiming in his or her right in any way howsoever (with the consent of the board as hereinafter provided by clause 16 of these presents), until the sum of 5*l.* shall be paid thereon, and after the sum of 5*l.* shall be paid thereon, then at his or her absolute discretion, to sell and transfer by deed duly stamped, in which the consideration shall be truly stated, and which deed of transfer may be in the form in Schedule B. to

these presents annexed (or such other form as the board shall prescribe, or as the board shall think fit in any particular case to permit), any shares to which he or they shall be entitled, or any of them, to any person or persons, subject nevertheless to the conditions or restrictions herein contained, and the same when duly executed shall be delivered to the secretary or other proper officer of the corporation, and be kept by him; and he shall enter a memorial thereof in a book to be kept at the offices of the corporation aforesaid, and to be called 'The Register of Transfers,' and shall endorse such entry on the deed of transfer, and shall on demand deliver a certificate of such transfer to the purchaser in the form in the Schedule C. to these presents annexed, or to the like effect; and for every such entry, together with such endorsement and certificate, the corporation shall be entitled to a sum not exceeding 2s., and such deed so endorsed shall be sufficient evidence of the consent of the board, and until such transfer has been so delivered to the secretary as aforesaid the vendor of the share shall continue liable to the corporation for any calls that may be made upon such share, and the purchaser of the share shall not be entitled to receive any part of the profits of the institution, or to vote in respect of such share. But no shareholder shall be entitled to transfer any share, after any call shall have been made in respect thereof, until he shall have paid such call and all other calls for the time being due on every share held by him. And it is hereby declared that every purchaser or transferee of shares shall, in respect of the shares purchased by or transferred to him, and at his own expense, when required by the said board, execute this deed, or enter into a deed of covenant with the corporation to observe, fulfil and perform all the clauses,

1861.

IRISH PEAT
Company
v.
PHILLIPS.

1861.
 IRISH PEAT
 Company
 v.
 PHILLIPS.

conditions and stipulations herein contained as by the said board shall be required; and until he shall do so, his rights and privileges of voting and receiving dividends shall remain in suspense: but from the time of his name being entered on the register of shareholders or register of transfers, he shall be liable to all calls thereafter in respect of his share or shares, and to all duties and obligations in respect thereof" (a).

21. [Directions as to convening extraordinary meetings and special general meetings of shareholders.]

23. [Directions as to the notice to be given of meetings whether annual general, special general, or extraordinary.]

"63. That it shall be lawful for the board from time to time to make such calls upon the shareholders, in respect of the amount of capital subscribed or owing by them, as they shall think fit. Provided that, as regards the first call, ten days' notice at least be given, and, as regards all other calls, twenty-one days' notice at the least be given of each call, and that the first call shall not exceed the amount of 5/. on every share, and that each subsequent call shall not exceed the amount of 2/. on every share, and that successive calls be not made at less than an interval of two calendar months.

"64. That the several persons who now have or hold, or shall at any time, or from time to time, have or hold, any share or shares in the said corporation, shall pay the sum or sums of money by them respectively subscribed, or such part or parts thereof as shall respectively from time to time be called for pursuant to or by virtue of the powers and directions of these presents, at such times and places, and to such persons and in

(a) This article, and the Schedules B. and C. therein referred to, were not set out in the case, but were referred to in the argument.

such manner, as shall be ordered and directed by the board for the time being; and in case any shareholder or shareholders shall neglect or refuse so to do, it shall be lawful for the said corporation to sue for and recover the same (together with interest at the rate of 5l. per cent. per annum), from such appointed time for payment and till payment from such shareholder or shareholders respectively, and his, her, or their heirs, executors or administrators; and in those cases where two or more shareholders shall be jointly possessed of any one or more share or shares in the said corporation, then from all, any or either of such shareholders, his, her, or their heirs, executors, or administrators.

"65. That in any action or suit to be brought by the corporation against any shareholder, to recover any money due from any call, it shall not be necessary to set forth the special matter; but it shall be sufficient for the corporation to declare that the defendant is the owner of one share or more in the corporation (stating the number of shares), and is indebted to the corporation in the sum of money to which the calls and arrears shall amount, in respect of one call or more, upon one share or more (stating the number and amount of each such calls), whereby an action hath accrued to the corporation, by virtue of these presents.

"66. That, on the trial or hearing of such action or suit, it shall be sufficient to prove that the defendant, at the time of making such call, was a holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given, as is directed by these presents; and it shall not be necessary to prove the appointment of the board who made such call, nor any other matter whatsoever; and thereupon the corporation shall be entitled to recover what shall be due

1861.

IRISH PEAT
Company
v.
PHILLIPS.

1861.
 IRISH PEAT
 Company
 v.
 PHILLIPS.

upon such call, with interest thereon, unless it shall appear either that any such exceeds the hereinbefore prescribed amount, or that due notice of such call was not given, or that the interval prescribed between the successive calls had not elapsed.

83. [Directions as to the mode of giving notices or sending letters to shareholders, and of convening meetings.]

Schedule A., referred to in Article 8, is in the following form :—

“ Number Form of Certificate of Share.

“ *Irish Peat Company.*

“ This is to certify that *A. B.*, of , is the holder of the share No. of *The Irish Peat Company*, subject to the regulations of the said Company.

“ Given under the common seal of the said Company, the day of A.D. 185 .”

Schedule B., referred to in Article 9, is in the following form :—

“ Form of Transfer of Shares or of Stock.

“ I, *A. B.* of a shareholder of the corporation called *The Irish Peat Company*, in consideration of the sum of paid to me by *C. D.* of do hereby transfer to the said *C. D.* share (or shares) numbered in the said corporation called *The Irish Peat Company*, standing in my name in the books of the same corporation, to hold to the said *C. D.*, his executors, administrators and assigns (or successors and assigns), subject to the several conditions on which I held the same at the time of the execution thereof; and I the said *C. D.* do hereby agree to take the said share, subject to the same conditions.

“ As witness our hands and seals, the day of 185 .”

Schedule C., referred to in Article 9, is in the following form :—

“ Form of Certificate of Transfer.

“ Transfer, No. .

“ I, *A. B.*, secretary of the corporation incorporated by Royal charter, by the name and style of *The Irish Peat Company*, hereby certify that a deed of conveyance No. , transfer shares in the said corporation bearing the following numbers, viz., from to inclusive, has been deposited and registered in the books of the corporation, this day of 185 .

“ Secretary.”

In the month of *March*, 1851, after all the arrangements had been made for the Royal Charter of Incorporation being granted, and the terms of the charter had been settled, shortly before the actual date of the charter, the promoters of the Company issued preliminary prospectuses, and invited applications for shares.

One of these prospectuses came to the hands of the defendant before he was informed that his name had been placed on the list hereinafter mentioned.

The prospectuses so issued contained, among other things, the following statements.

“ Capital, 120,000*l.*, in 6000 shares of 20*l.* each, with liberty to increase to 500,000*l.*

“ Deposit on allotment of shares, 2*s.*

“ Call on each share on obtaining the charter, two pounds; two months afterwards a further call of one pound, and one pound more at the end of six months from the date of the charter. No further call until the works are in operation, nor then without the approval of a majority in value of the shareholders.

“ In carrying out the views of *The Irish Peat Company*, it is computed that a capital of 10,000*l.* will be

1861.

IRISH PEAT
Company
v.
PHILLIPS.

1861.
 IRISH PEAT
 Company
 v.
 PHILLIPS.

adequate to the erection of an establishment provided with all suitable apparatus for operating on 100 tons of peat daily, or 36,500 tons per annum, and that it will also be sufficient to provide the means of carrying on the current expenses of the manufactory. The remaining portion of the capital would therefore be expended in the establishment of similar works in different parts of the country."

The defendant did not himself make any application for shares in the Company; but Messrs. *Hutchinson & Co.*, who were the brokers to the Company, without any authority from the defendant, placed the defendant's name on a list with other names, as a person to whom shares might be allotted. Messrs. *Hutchinson & Co.* had not at the time any direction or express authority to place the name of the defendant on this list, or to apply for shares for him, but they shortly afterwards informed the defendant that they had so done, and he did not repudiate or object to what they had done.

Upon this the Board of Directors allotted to the defendant 50 shares, and communicated the fact to him in the following letter of allotment, which was written on the day it bears date, and was received by the defendant on the following day.

"9, Old Jewry Chambers, London,

"*The Irish Peat Company*, "March 24th, 1851.

"Incorporated by Royal Charter.

"Letter of Allotment.

"Sir. With reference to your application for shares in *The Irish Peat Company*, I am directed to acquaint you that the board having now obtained a Royal charter incorporating the Company, and having, with the sanction of the Board of Trade, purchased Mr. *Reece's* patent and all future improvements thereof for a

sixth of the shares in the Company (to be held by him as paid up), they have allotted to you 50 shares in this Company, subject to the payment of a deposit of 1*l.* per share, amounting to 50*l.*, which sum I have to request you will pay to *The Royal British Bank*, either at the Head Office, 16, *Tokenhouse Yard, London*, or the West End Branch, 429, *Strand, Westminster*, when this letter must be produced, and the above mentioned payment made, on or before the 4th day of *April*, 1851, or this letter will be void; and also subject to the following calls for payment in respect of each share, viz., 1*l.* on 1st *May* next, 1*l.* on 1st *July* next, and 1*l.* on 1st *September* next, but to no further call until the works are in full operation, nor then without the approbation of the majority in value of the shareholders.

"This letter must be delivered up to the Bank on payment of the deposit, but on the production of the bankers' receipt (in the form annexed), and on your execution of the deed prepared in conformity with the provisions of the Royal charter, you will be entitled to 50 share certificates of the Company.

"I am, Sir,

"Your most obedient servant,

"*Thomas M'Quige*, Secretary.

"*John E. Phillips*, Esq."

Upon the 4th *April*, 1851, the defendant paid the deposit of 1*l.* per share upon the number of shares so allotted to him, amounting to 50*l.*, into *The Royal British Bank*, and delivered up to the Bank the said letter of allotment. Upon the 30th *April*, 1851, the defendant paid to the Company the first call of 1*l.* per share upon all the said shares, being that mentioned in the letter of allotment as payable on the 1st *May*, 1851. Upon the 24th *July*, 1851, he paid the second

1861.

IRISH PEAT
Company
v.
PHILLIPS.

1861.
 IRISH PEAT
 Company
 v.
 PHILLIPS.

call of 1*l*. per share upon all the said shares, being that mentioned in the letter of allotment as payable on the 1st of *July*, 1851, and upon the 5th *September*, 1851, he paid the third call of 1*l*. per share upon all the said shares, being that mentioned in the letter of allotment as payable on the 1st *September*, 1851.

On the 29th *July*, 1852, a further call was made of 2*l*. per share, payable by two instalments of 1*l*. each, the first on the 1st *September*, 1852, and the second on the 1st *November*, 1852. Due notice of this call was given to the defendant, and he paid the first instalment of the call, upon the number of shares so allotted to him as aforesaid, upon the 4th *September*, 1852, and the second instalment upon the 30th *October*, 1852.

The defendant made these several payments in the belief that the statements contained in the said prospectus and letter of allotment, as to the times when calls beyond the first 4*l*. would be made, would be acted upon by the Company.

Shortly after the incorporation of the Company, and after payment of the said deposit and first call, the name of the defendant was entered by the secretary of the Company upon the register of shareholders in the following form :—

REGISTER OF SHAREHOLDERS.

Register. No. 100.	Name.	REGISTERED SHARES.			Numbered from to
		Residence. Stock Exchange.	Description. Stockbroker	No. of Shares. 50	

CALLS PAID.

1, 2, 3, 4, 5, 6, 7, 8, 8.	Remarks.
50, 50, 50, 50, 50, 50	

Seal of Company.

And subsequently the name of the defendant was entered upon a second register in the following form :—

REGISTER OF SHAREHOLDERS.

1861.

REGISTERED SHARES.						IRISH PEAT Company v. PHILLIPS.
Register.	Name.	Residence.	Description.	No. of Shares.	Numbered from to	
No. 83.	John E. Phillips	Stock Exchange, E.C.	Stockbroker	50		
CALLS PAID.						
	No. 1, 8, 9, 10, 1st; 10, 2nd; 11, 1st; 11, 2nd, 12th, 13th, 14th				Remarks.	

(L. S.)

No other registers were ever kept by the Company ; but these registers have been from time to time regularly authenticated, as required by the deed of settlement, and the second register is that kept by the Company as the register of the present shareholders of the Company.

Except in the above two instances the defendant's name does not appear in the register books of the Company, and there are no statements in such registers of the times when the defendant's name was entered in them respectively.

The defendant never attended any meeting of the Company, nor ever interfered in any way, nor did anything whatever in respect of the affairs of the Company, except making the several payments hereinbefore mentioned.

He never executed the deed of settlement, nor was he asked to do so till the 26th day of *March*, 1856. He never saw or knew the contents of the charter or deed of settlement till after the commencement of this action. He never applied for or received the certificates for any shares, and no particular or numbered shares were ever allotted to him, or ever stood in his name in the register of shareholders or in any books of the Company.

A sum exceeding 60,000*l.* of the original capital of the Company was subscribed for within six calendar

1861.
 IRISH PEAT
 Company
 v.
 PHILLIPS.

months from the date of the charter ; but 12,000*l.* of such sum was not paid within that period, nor had that amount been paid until the month of *July*, 1852.

This fact, and the extent to which the Company had carried on business, and the position of their works at the time, were communicated by the directors to the shareholders at a special general meeting of the Company on the 4th *May*, 1853, duly convened for the following purposes ; viz.

“ To read the report of the directors upon the progress of the enlarged works, their present state, and the position and prospects generally of the Company.

“ The report of the late auditors upon the Company’s accounts up to *July*, 1852.

“ And to appoint auditors for the current year.”

The statements in the above report relating to the amount subscribed, and to the extent to which the Company had carried on business, and the position of their works, at the time when the said report was made, are as follows :—

“ From 10,000*l.* to 12,000*l.*, being considered a sufficient sum to test the commercial value of the patent in furnaces of sufficiently large dimensions, calls amounting to 4*l.* per share were made upon 3425 shares, being the number upon which deposits were paid by the subscribers.

“ These calls produced about 12,000*l.* up to *July* last.

“ Up to last Summer the works were on a scale, which, while they were intended to admit of enlargement, was calculated for little more than experiment, and, being experimental, they did not go on continuously for any length of time ; and, from last *July*, when their enlargement was determined on, they have, of course, been but little worked.

"It should be known that these erections and machinery compose a whole which can only be worked together, and therefore, from the month of *August* or *September* last, they have wholly ceased working. When they are recommenced, however, a few weeks only need elapse before all the results of a commercial undertaking may be reasonably expected."

In the auditors' report, from the commencement of the Company to the 30th *June*, 1852, which formed part of the report read at the above meeting, is the following paragraph:—

"The 200*l.* given to Mr. *Hills* as part payment of calls on the fifty shares held by him, for his experiments at *Dartmoor*, and to obtain his services as a director, being a peculiar application of the capital of the Company, we think it should be brought under notice, although we are satisfied the directors formed the resolution on this subject with the best intentions."

The defendant did not attend this meeting, but subsequently received a printed report of it, and then for the first time became aware of the above facts mentioned in the said reports.

[The case then stated that between *October*, 1852, and *January*, 1858, seven further calls were made.]

The works of the Company were not in full operation till the month of *January*, 1855, and all the last seven calls were made by the directors, and not by a general meeting, or by the vote of the majority in value of the shareholders.

Due notice of the seven last calls was given to the defendant, but he did not pay any of them, and the plaintiffs claimed from him in this action the amount of those seven calls, except the second instalment of the last of them, and also interest at the rate of 5*l.* per cent.

1861.

IRISH PEAT
Company
v.
PHILLIPS.

1861.
 IRISH PEAT
 Company
 v.
 PHILLIPS.

per annum from the days when the same was
 tively payable.

The various applications for payment by the
 through their secretaries or attorneys for the
 and the replies of the defendant through his
 Messrs. *C. & J. A. Morgan*, are shewn by the
 letters:—

“ 61, Moorgate Street, 3d Novem

“ Sir. I am instructed by the court of
The Irish Peat Company to apply to you for
 payment of the sum of 50*l.*, being the amount
 upon the shares you now hold in that Company
 inform you that unless that sum, together with
 my charge for this application, be paid to
 course of this week, legal proceedings will be
 commenced against you for the recovery thereof
 further notice.

“ I am, Sir, your obedient servant

“ *H. Empson*

“ Agent for *Mullins &*

“ Solicitors to the Court

“ *John E. Phillips, Esq.,*

“ Stockbroker, Stock Exchange.”

“ 15, Old Jewry, 4th Novem

“ Sir. Mr. *J. E. Phillips* has handed us your
 him of yesterday's date, demanding payment of
 calls due to *The Irish Peat Company* in respect
 held by him in that Company. In answer to
 application, we have to inform you that Mr
 declines to pay any further calls unless legally
 as, from the report of the directors of the 4th
 it appears that the Company is not constituted
 basis of the prospectus under which he was in

take shares, and that, in making the calls, the directors are departing from the terms of such prospectus. Under such circumstances, and being of opinion that the funds of the Company already subscribed have been most injudiciously expended, Mr. *Phillips* has instructed us to defend any action the directors may think proper to bring against him for calls made since the report referred to. You will be kind enough, therefore, to send any process to us you may be instructed to issue against Mr. *Phillips*, to which we will give an undertaking to appear.

"*H. Empson, Esq.,*

"We are, &c.,

"61, *Moorgate Street.*"

"*C. & J. A. Morgan.*"

"*November 24th, 1853.*

"Sir. I am instructed to inform you that, by a resolution of the board of directors passed at a meeting held here on *Tuesday* the 22d instant, your shares held of this Company will be forfeited, for nonpayment of calls, unless the calls due upon the said shares are paid on or before the 29th instant.

"I am, Sir, your very obedient servant,

"*J. E. Phillips, Esq.*"

"*T. M'Quige, Secretary.*"

"15, *Old Jewry, 25th November, 1853.*

"*Irish Peat Company.*

"Sir. Mr. *J. E. Phillips* has handed us your letter to him of the 24th instant, informing him that, unless the calls due upon the shares held by him in this Company are paid by the 29th instant, such shares will be forfeited.

"In answer to such intimation, we have to inform you that Mr. *Phillips* declines paying any further calls on the fifty shares held by him, on the grounds set forth in our letter to your solicitor of the 4th instant.

1861.

IRISH PEAT
Company
v.
PHILLIPS.

1861.
 IRISH PEAT
 Company
 v.
 PHILLIPS.

"Mr. *Phillips* is, however, ready, and here to hand over his shares to the Company upon back the 200*l.* paid by him on such shares have to inform you that he requires such sum repaid him by the 30th instant, or he will be under necessity of instituting proceedings for the thereof.

"We are, Sir, your obedient servant

"*Thos. M^cQuige*, Esq., "C. & J. A. J.

"Secretary *Irish Peat Company*,

"10, Old Jewry Chambers."

[Other letters were set out, the last of which was from the defendant's attorney to the secretary of the Company dated 23rd *October*, 1858.]

The Court was to have the power of drawing conclusions of fact which a jury ought properly to draw.

The question for the opinion of the Court was whether the defendant was liable in this action to the payment of the calls remaining unpaid, or any and all of them.

If the Court should be of opinion that the defendant was liable in this action to the payment of the calls, or any part of them, judgment was to be given for the plaintiffs for the amount of such calls. If otherwise he was liable herein, with interest. If otherwise judgment was to be entered for the defendant.

The case was argued, on *January* 25th, before *Lord* *Ston* and *Hill JJ.*, by

Lush, for the plaintiffs.—The defendant is liable for these calls. He contends that he is not a shareholder because the Company has been constituted in a manner different from that stated in the prospectus. The prospectus was merely preliminary to the act

tion of the Company by charter, in which charter the Crown had the right to introduce what terms it pleased. It is true that the defendant has never executed the deed of settlement. But it was in his power, and it was his duty, to do so; and he cannot now avail himself of his own neglect in that respect, having treated himself in other respects as a member, by taking shares and paying calls; *Burnes v. Pennell (a)*; *The Cheltenham and Great Western Union Railway Company v. Daniel (b)*. Even if he had been induced to become a shareholder by false representations, that would be no answer to his liability to the Company, unless they had made those representations, and had so caused him to enter into the contract; *The Deposit and General Life Insurance Company v. Ayscough (c)*; *Clarke v. Dickson (d)*. [He was then stopped by the Court.]

1861.
IRISH PEAT
Company
v.
PHILLIPS.

Phlipson, for the defendant.—The defendant has a material defence to this action. He has never executed the deed of settlement. It is true that he agreed to take shares, after his name had been entered on the allotment list, though it had been so entered without his authority. But he must be held to have agreed to take them upon the terms mentioned in the letter of allotment subsequently sent to him; and cannot be bound by other and inconsistent terms in the deed of settlement. The terms of the letter of allotment have not been carried out; for that document states that no calls beyond the three there specified would be made, in any case, until the works were in full operation. If he had signed the deed he would no

(a) 2 H. L. Ca. 497.

(b) 2 Q. B. 281.

(c) 6 E. & B. 761.

(d) E. B. & E. 148.

1861.

IRISH PEAT
Company
v.
PHILLIPS.

doubt be liable ; but, not having done so, he cannot be treated as a shareholder ; *The Galvanized Iron Co. v. Westoby* (a). [Crompton J. Is he not a shareholder ? His name is on the register.] That, by itself, is not sufficient. The 5th clause of the charter, which provides that every person whose name shall have been entered on the register of shareholders shall be deemed to be a shareholder, must be read in connection with the 6th clause, which provides that every share in the company is to be distinguished by its number, and with the 7th clause, which provides that each shareholder is to receive a certificate of ownership, specifying the share in the undertaking to which he is entitled. The defendant's shares are not so numbered in the register, nor has he received any certificate. He cannot, therefore, be considered a shareholder until he has signed the deed ; and he is not bound to sign a deed which was not such as, in conformity with the letter of allotment, he could be properly called upon to sign ; *Ashpitel v. Sercombe* (b). [Crompton J. But here, after the Company has been established, the defendant acts as a shareholder by paying the calls. In *The New Brunswick and Canada Railway Company v. Muggeridge* (c), where the defendant had agreed to take 100 shares, and a certain number were allotted to him, and his name was placed on the register of shareholders, but he had not signed the memorandum of association, it was held that he was not a shareholder. [Crompton J. There the defendant had never acted as a shareholder in the allotment.] That case was taken into the Exchequer Chamber, and the judgment affirmed (d). *Yelland v. The London and North Western Railway Co.* (e) was there cited by the counsel for the plaintiff.

(a) 8 Exch. 17.

(b) 5 Exch. 147.

(c) 4 H. & N. 160.

(d) 4 H. & N. 580.

(e) 5 De G. & S. 395 ; S. C. on appeal, 21 L. J. Ch. 852.

tiffs : and *Willes J.* said, p. 582 : "The question there was, whether the petitioner was liable as a contributory. A person may be a contributory, though not a shareholder. When the case came before the Court of appeal, Lord *Cranworth* treated the petitioner as not being a shareholder, and expressly said that he was not liable at law." Moreover, as has been already urged, the defendant here could not be a shareholder at all until his shares had been numbered in the register, and he had received his certificate. No specific shares have ever been assigned to him. *The Southampton Dock Company v. Richards* (a) and *The London Grand Junction Railway Company v. Freeman* (b) shew, by implication, that such an irregularity avoids any liability as a shareholder on the part of the particular person irregularly entered in the register. And in *The Wolverhampton New Waterworks Company v. Hawksford* (c) it was expressly decided that a document, sealed as a register of shareholders, in which names were entered, but which contained no numbering or specific appropriation of shares, is not sufficient evidence that the persons named therein are shareholders. [*Hill J.* In the letter written by the defendant's attorney, on 25th November 1853, there is a distinct admission that the defendant is a shareholder.] The whole letter, taken together, clearly repudiates any liability in that character.

1861.

IRISH PEAT
Company
v.
PHILLIPS.

Lush, in reply.—It was the duty of the defendant to take up the shares ; and, until he had done so, the Company could not number them. The Company could not

(a) 1 *M. & G.* 448 ; 1 *Scott. N. R.* 219.

(b) 2 *M. & G.* 606 ; 2 *Scott. N. R.* 705.

(c) 7 *C. B. N. S.* 795. 813.

1861.

 IRISH PEAT
 Company
 v.
 PHILLIPS.

have resisted a claim by the defendant for a dividend on the ground that the shares were not numbered. The defendant would be bound to consider him as a shareholder if this objection be valid, the defendant could have done so even after he had signed the deed. *The Southampton Dock Company v. Richards (a)*, and *The Grand Junction Railway Company v. Freeman (b)* are in favour of the plaintiffs; for they shew that such provisions as these respecting the numbering and appropriation of the shares are only directory. As to the objection being inconsistent with the terms of the charter and the letter of allotment, that objection is taken too late. The defendant could have inspected the charter and the letter of allotment, and, if he had found them inconsistent with the letter of allotment, could have repudiated his liability: but he not only took no steps toward inspection, but acted as a shareholder by paying dividends after the Company had been regularly constituted.

Cur. ad.

CROMPTON J. (*February 13th*) delivered the judgment of the Court.

This was an action to recover the amount of dividends called alleged to be due from the defendant as a shareholder in *The Irish Peat Company*. This Company was established under a charter from the Crown, and the provisions required by the charter, the provisions of which were substantially the same as those contained in the Companies Clauses Consolidation Act, 1845. The provisions of the deed necessary to be noticed are the 3rd, 5th, 6th, 8th, 65th, and 66th. [His Lordship then read

(a) 1 *M. & G.* 448; 1 *Scott, N. R.* 219.

(b) 2 *M. & G.* 606; 2 *Scott, N. R.* 705.

clauses.] It appeared upon the special case that the defendant had assented to fifty shares having been allotted to him, and that he had paid the deposit and four calls upon these shares.

1861.

IRISH PEAT
Company
v.
PHILLIPS.

Three objections were made on the part of the defendant: first, that it was represented by the prospectus and letter of allotment that no calls, except certain specified ones which had been paid by the defendant, should be made until the Company's works should be in operation. If, however, the defendant had become a member of this corporation, we do not think that after the payment of calls, and especially of the one call made after the calls specified in the prospectus and letter of allotment, and after the correspondence in which he is clearly treated as a holder of shares, he would be allowed, as against the other shareholders and the Company, to say that he was no shareholder for the purpose of liability to calls, on the ground that the calls were not authorized by the representations in the prospectus and letter of allotment. The calls in question were authorized by the charter and the deed: he knew of the existence of the charter and of the deed; and, if he chose to become a shareholder under its provisions, he must, we think, be liable to all the calls authorized by the charter and the deed. After acceptance of the shares and payment of the deposit and the calls, and especially of that call made after those mentioned in the prospectus and letter of allotment, he cannot say, as against the other shareholders, that he was not a shareholder by reason of the stipulations in the prospectus and letter of allotment not being carried out.

The second objection was, that the defendant had not signed the deed. A shareholder is defined, in the 5th clause, as a person who shall have subscribed the pre-

1861.
IRISH PEAT
Company
v.
PHILLIPS.

scribed sum to the capital of the corporation, &c., and whose name shall have been entered on the register of shareholders. The provision in this case is for subscribing the sum ; there was no subscribers' contract, and the meaning of the subscription in this clause seems to be that the parties should have agreed to pay the subscription ; and, as well from the construction of the 5th clause as from the authorities cited on the argument, we should, if it had been necessary to pronounce an opinion on this point, have been disposed to think that this objection fails. It is, however, unnecessary to decide upon either of these two points, as a third point was suggested on the part of the defendant to which we feel bound to yield, according to a recent decision of the Court of Common Pleas.

This third objection was, that no specific shares, identified by numbers, had ever been appropriated to the defendant. The register merely shewed an entry as to the defendant's shares in this form. [His Lordship then read the entry as set out in the special case.]

We thought that an inspection of the register might have thrown some light upon this point ; but we find in this, as in many other instances in this book of registry, that a certain number of shares merely are entered as belonging to the defendant and other individuals, without any specific numbered shares being appropriated. The fifty shares entered as belonging to the defendant are not numbered themselves, nor do they follow or precede any numbered shares ; and it is impossible, by any implication, to make out that any specifically numbered shares were ever appropriated to the defendant : and indeed it is expressly found in the special case that " no particular or numbered shares were ever allotted to him, or ever stood in his name in the register of share-

holders, or in any books of the Company." In the absence of any adjudged case, it might have admitted of considerable argument whether the clauses providing what is to be alleged and proved in an action for calls might not have been satisfied by proof of general ownership of shares entered in the register, in the name of the alleged owner, with an accompanying statement of the number of calls paid up on such shares. The clause as to the mode of declaring speaks of the ownership of shares, and not expressly as to the being a shareholder as defined by the earlier section: and the word "number" mentioned in that clause clearly refers to the number of shares held, and not to the specific number of the shares, and it may be difficult to see why the entry of fifty shares in the defendant's name, with a statement of the number of paid up calls, would not be sufficient for the purpose of calls, dividends, or transfers; and it might, but for the case we have referred to, have been a question how far this part of the regulations might not be considered as directory only, as well as the requirement that the party should sign the deed in some of the cases referred to. It must, however, be remembered that the signing is the act of the party, whilst the creation and appropriation of the specifically numbered shares is a duty expressly thrown on the Company. We find, however, that in the case of *The Wolverhampton New Waterworks Company v. Hawksford (a)*, the Court of Common Pleas have really decided the question before us, and we feel bound by their decision. They say, p. 812, 813, 814: "As to the first question, the facts proved must be taken to be, that the Company had assented to appropriate one hundred

1861.

IRISH PEAT
Company
v.
PHILLIPS.

(a) 7 C. B. N. S. 795.

1861.

IRISH PEAT
Company
v.
PHILLIPS.

shares to the defendant, and that he assented to them; but no shares had been numbered, and no shares had been appropriated. The defendant's with others had been put down on a sheet of paper this had been sealed as a register of shareholders we have already expressed our opinion that it was register, not having any of the essentials required by the Act, and not appearing to have been intended as a register. Upon these facts, we think that the defendant is not liable to the calls made after *January*. He is not shewn to be the holder of any specific shares within the meaning of sect. 27, giving the action for calls." "Although, as above said, the shares must be numbered and specifically appropriated this process requires the formation of a book analogous to a register, still it may be done without authentication by sealing at an ordinary meeting." "We think the statute contemplated the process above described of numbering and appropriating, and may well have intended that an inchoate register book, *bonâ fide* intended to be valid, might be taken for this purpose as a register de facto, although not properly sealed." This case is a decision that shares are not created, so as to make an alleged owner a shareholder liable to calls thereon, unless the shares are specifically numbered and appropriated by number.

We feel ourselves bound by this decision of a court of co-ordinate jurisdiction, and accordingly yield to this objection; and our judgment, therefore, is for the defendant.

Judgment for the defendant.

(a) The case in the Queen's Bench is reported by *Francis Ellis*

1861.

IN THE EXCHEQUER CHAMBER.

*Monday,
July 8th.*The IRISH PEAT COMPANY *against* PHILLIPS.For head note, see *antè*, p. 598.

THE plaintiffs having alleged error in the above judgment,

In *Easter Vacation*, May 10th, the case was argued; before *Williams, Willes, Byles* and *Keating JJ.*, and *Bramwell* and *Channell BB.*

It was agreed that this Court should look at the register of shares, in order to see the form in which it was kept, as the Court of Queen's Bench had done.

Horace Lloyd, for the plaintiffs.—In the argument in the Court below three objections were made on the part of the defendant. [*Phipson*, for the defendant, said that he intended to rely only on two points—first, that the defendant, not having signed the deed of settlement, was not liable to be sued as a shareholder; and, secondly, that, no specific numbered shares having been allotted to him, he was not a shareholder within the definition in the deed.] As to the first of these points, the Court of Queen's Bench was in favour of the plaintiffs. They said (*ante*, p. 626): “As well from the construction of the 5th clause as from the authorities cited on the argument, we should, if it had been necessary to pronounce an opinion on this point, have been disposed to think that this objection fails.”

1861.

IRISH PEAT
Company
v.
PHILLIPS.

As to the objection that the shares allotted to the defendant are not numbered in the register of shareholders. The 5th clause of the deed of settlement contains conditions in order to a person being deemed a shareholder. He must, by subscribing the prescribed sum, otherwise, have become entitled to a share, and his name must have been entered on the register of shareholders. The Court of Queen's Bench, in deciding that the defendant was not a shareholder liable to calls, because no specific shares identified by numbers had been appropriated to him, yielded to the authority of *The Walthampton New Waterworks Company v. Hawksford*. But in that case there was no sealed register, and no shares were not created, but in process of formation only. In this action the Company have only to establish that the defendant may be treated as the proprietor of the shares. In *The London Grand Junction Railway Company v. Freeman* (b) one point was, whether the production of the register was sufficient evidence of the defendant being a proprietor, the Act of the Company having made it so if it was kept according to its provisions; and it was contended that the register produced was not evidence, because it was kept in a manner by no means conformable to the Act; but the Court held that it was admissible, provided it was bona fide with the intention of doing what the Act directed, and in essentials complying with its directions. The provisions of the Act as to all the details to be included in the book being to a great extent merely directory. [Channell B. By sect. 8 of The Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16

(a) 7 C. B. N. S. 795.

(b) 2 Man. & G. 606; 2 Scott N. R. 705.

which statute *The Wolverhampton New Waterworks Company v. Hawksford* (a) was decided, every person who shall "have become entitled to a share in the Company, and whose name shall have been entered on the register of shareholders hereinafter mentioned, shall be deemed a shareholder of the Company;" but there are no negative words. Section 9 directs that in the register shall be entered the names of the persons entitled to shares, "together with the number of shares to which such shareholders shall be respectively entitled, distinguishing each share by its number." *Wilde B.* Sect. 16 of The Joint Stock Companies Act, 1856, 19 & 20 Vict. c. 47., contains a similar direction; and by sect. 19 every person who has accepted any share in a Company registered under this Act, and whose name is entered in the register of shareholders, and no other person shall for the purposes of this Act be deemed to be a shareholder." In this case the book kept was intended to be a register of the shareholders, and it contains all the requisites mentioned in clause 6, except that the shares of the defendant are not numbered; though, upon an inspection of the register, it appears that in some instances the shares of other persons are numbered. It is a matter of convenience, for the purpose of effecting a transfer of the shares, that they should be distinguished by being numbered, but they can be traced without being numbered. [*Byles J.* Suppose the owner of two shares sells them to different persons, one for 60*l.* and the other for 50*l.*, and the buyers differ as to which share each is entitled to, is not that a difficulty if the shares are not numbered?] They are the same shares, whether numbered or not. The creation of the shares is inde-

(a) 7 C. B. N. S. 795.

1861.

IRISH PEAT
Company
v.
PHILLIPS.

1861.

 IRISH PEAT
 Company
 v.
 PHILLIPS.

pendent of numbering them, and the numbering is not essential to the original registration. It would be paid upon them, and the holder would respect of them at meetings of the Company they were not numbered. In this case calls were in respect of the defendant's shares, and he paid upon them.

Phipson, for the defendant.—First, it is necessary there should be an appropriation of specified shares to an allottee, and a registration of them, to make a shareholder under this deed of settlement; and this is a substantial, not a formal objection. The Company was created by charter, and that charter did not create shares, but contained regulations in pursuance of which they were to be created. The capital is to be divided by the deed into shares, and then the shares are created. By clause 64, a person must be a shareholder before he is to be liable to be sued for calls; and a shareholder is a person whose name is put upon the register in respect of the identical shares allotted to him, each share being distinguished by its proper number. The shares are created by appropriation, allotment, and registration. [The deed is referred to clauses 3, 5, and 6.] The certificate of shares, which, by clause 8, is to be given to a shareholder, does not create the shares, but only identifies the numbered shares which have been allotted to the shareholder. Until the shares are appropriated a person is not a shareholder of shares within the meaning of the deed, and is not liable as such to be sued for calls, though he may be a shareholder to have shares. A person cannot be a shareholder if he has no shares which can be transferred; and the secretary cannot make an entry of the transfer of shares.

unless they are numbered. The "Form of Transfer of Shares," and the "Form of Certificate of Transfer," prescribed by clause 9, and given in Schedules B. and C., contemplate that the number of the shares shall be mentioned in them. Unless the shares are numbered there is no security against an over issue of shares. [*Bramwell* B. Suppose shares numbered with the same number are allotted to different persons, and then they by deed transfer them to *C. D.* and *Y. Z.* respectively.] The person whose name was first entered on the register would be the owner of the shares; the second allotment would be void. The omission to appropriate specific numbered shares to the defendant is the default of the Company. [*Bramwell* B. Suppose an owner of shares, numbered from 1 to 20, duly transferred them, but by mistake they were described in the deed of transfer as shares numbered from 10 to 20.] That would be falsa demonstratio, quæ non nocet. In *The London Grand Junction Railway Company v. Freeman* (a) the defendant's shares were properly numbered, and therefore the register was good as against him, though the shares were not all distinguished by their proper number; but Lord *Denman* C. J., in delivering the judgment of the Court (b), said, "It is essential for the purposes of the action for calls that the names and number of shares shall be shown in evidence." *The Wolverhampton New Waterworks Company v. Hawksford* (c) does not necessarily decide this point. But the observations of the Court, in their considered judgment, are in favour of the defendant (p. 814):—"We think the statute contemplated the process above described of numbering and

1861.

IRISH PEAT
Company
v.
PHILLIPS.

(a) 2 *Man. & G.* 606; 2 *Scott N. R.* 705.

(b) 2 *Man. & G.* 636; 2 *Scott N. R.* 748.

(c) 7 *C. B. N. S.* 795.

1861.
 IRISH PEAT
 Company
 v.
 PHILLIPS.

appropriating." [*Williams J.* The question is, whether the clauses in question are directory or peremptory.] The terms in this charter are more compulsory than those in sect. 9 of The Companies Clauses Consolidation Act, 1845, 8 & 9 *Vict. c. 16*.

Secondly, the defendant never executed the deed of settlement, and therefore is not liable in this action. The letter of allotment concludes thus:— "On the production of the bankers' receipt (in the form annexed), and on your execution of the deed, prepared in conformity with the provisions of the Royal charter, you will be entitled to fifty share certificates of the Company." The defendant subscribed on the faith of the letter of allotment and the prospectus; he was not a shareholder under the provisions of this deed; though the Court of Queen's Bench, in deciding upon the first objection, said (*antè*, p. 625), that he "had become a member of this Corporation," and that "he chose to become a shareholder under the provisions" of the deed. The plaintiffs, in their declaration, treat this as a call under the provisions of the deed of settlement. The declaration concludes, "whereby an action hath accrued to the plaintiffs against the defendant, under and by virtue of their deed of settlement." The defendant cannot be estopped from denying that he is bound by the deed, by reason of his having paid money which he was not liable to pay. A party can only be estopped by his act, when it is one from which he has received a benefit. In *Burnes v. Pennell* (a) it was held that performance of the acts required to be done by the purchaser of shares, in order to constitute him a member of the Company, was a duty cast upon him for the benefit of the Company, and that his non-performance

(a) 2 *H. L. Ca.* 497.

of some of them did not enable him as respected the Company, to retire from his contract. That case is not an authority for holding that the defendant is liable as a shareholder, though he has not signed the deed.

1861.

IRISH PEAT
Company
v.
PHILLIPS.

Horace Lloyd, in reply.—As to the objection that the defendant has not executed the deed of settlement. The charter constitutes a Company or corporate body, consisting of all persons who are holders of shares. There is nothing in the charter to make it necessary that a person should become a shareholder by signing the deed: the only question under it is, whether the defendant is a holder of shares. (He cited *The Birmingham, Bristol and Thames Junction Railway Company v. Locke* (a), *The London Grand Junction Railway Company v. Graham* (b) and *The Cheltenham and Great Western Union Railway Company v. Daniel* (c).] In the latter case *Cresswell*, arguendo, said (p. 290), "It has been decided that, where a person intentionally induces a Company to take some step recognising him as a proprietor, he cannot, as against the Company, deny that he is one" (referring to *The Sheffield and Manchester Railway Company v. Woodcock* (d) and *The London Grand Junction Railway Company v. Freeman* (e). [Channell B. Clause 65, which permits the plaintiff in an action for calls to declare briefly, concluding "whereby an action hath accrued to the corporation by virtue of these presents," means that the deed is the basis of the action, though not set out in the declaration. Supposing the argument on the other side to be

(a) 1 Q. B. 256.

(b) *Id.* 271.

(c) 2 Q. B. 281.

(d) 7 M. & W. 574.

(e) 2 Man. & G. 606.

1861.
IRISH PEAT
Company
v.
PHILLIPS.

correct, would it be sufficient to allege that the defendant assented to the deed, or held himself out as a shareholder, if clause 65 did not enable the plaintiffs to declare briefly?] The Company can sue the defendant independently of any provision of the deed enabling them to do so. The defendant became a shareholder in the Company as constituted, and is therefore subject to the regulations of the deed, because he has agreed that they shall be the regulations of the Company.

As to the other objection. Suppose there was no index to the register as directed by clause 6; if the shares were numbered, could it be objected that they were not numbered in the register? The shares are created by the deed of settlement; so that the omission of the Company to affix a number to each share does not undo what had been done when the number of shares to be issued was declared. Besides shares could be transferred without being numbered. It is not necessary to adopt the form of transfer given by the deed: the defendant could go to the office, and ask for the certificate of his shares, which would contain the number of each, and then he could write the number into the transfer. Also the certificate is not absolutely necessary; it is only convenient evidence of the ownership of shares.

Cur. adv. vult.

CHANNELL B. (*July 8th*) delivered the judgment of the Court.

The material circumstances in this case are as follows.

The declaration stated, "The defendant is a holder of fifty shares in the Company, and indebted to them in 600*l.* in respect of seven calls, whereby an action has

accrued to them against him under and by virtue of their deed of settlement." The defendant pleaded: First. Never indebted. Second. That he was not a holder of the shares. Third. That the deed was not his deed. The replication to the third plea set out the charter of incorporation, whereby Her Majesty willed that the capital should be 120,000*l.*, divided into 6000 shares; that all the proprietors of stock of the Corporation should execute a deed of settlement, whereby the capital should be divided into those shares, to be numbered in regular succession, and whereby they should enter into covenants for payment of the amounts subscribed by them when called for. The replication shows that such a deed was executed, and sets forth various clauses, and then alleges that the defendant was a shareholder, and had paid certain other instalments and calls. On this the defendant took issue.

The charter is dated *April* 12th, 1851. Before it was granted the brokers of the persons engaged in promoting the Company put down the name of the defendant as an applicant for shares, and the promoters allotted to him fifty shares, and sent him an allotment letter, informing him thereof and requiring a deposit of 1*l.* per share, adding, "And on your execution of the deed prepared in conformity with the provisions of the Royal charter, you will be entitled to fifty share certificates of the Company." The defendant paid the deposit of 1*l.* a share. The charter was afterwards granted, and the deed prepared and executed by many shareholders, but not by the defendant. Various calls were made, and paid by the defendant, but he refused to pay a subsequent call made in *May*, 1853, which, with others

1861.

 IRISH PEAT
Company
v.
PHILLIPS.

1861.

IRISH PEAT
Company
v.
PHILLIPS.

made since, are sought to be recovered in this action. In the deed are the following clauses (3, 5, 6, 8) (a). [His Lordship read them.] In pursuance of these clauses a register was prepared, in which the names of shareholders were entered, the defendant's among them; but against his name in the column for the number of the shares was a blank. His shares had never been numbered.

- The Court of Queen's Bench gave judgment for the defendant. The ground on which they proceeded was that this case was concluded by that of *The Wolverhampton New Waterworks Company v. Hawksford* (b), and they indicated very considerable doubt of the propriety of that decision. In that doubt we do not concur, as it does not seem to us that the decision was such as supposed by the Court below. What was decided there was that there was no sealed register at the time of the first calls, and that unless there was the defendant was not then a shareholder liable to calls. The remark that the defendant was not the owner of specific shares is only in furtherance and illustration of the remark that there was no sealed register. We think that case was rightly decided, but that it was no authority, as supposed, for the decision in the Court below; and some of us concur in that part of the doubt there indicated, viz., whether the want of numbering the shares in the register would of itself be a bar to this action.

But it is not necessary to decide that question, as there is another objection taken by the defendant on which we think him entitled to judgment. The decla-

(a) See ante, p. 604—606.

(b) 7 C. B. N. S. 795.

ration and the replication to the third plea both assert, the former in part by implication, the latter in words, that the defendant was a shareholder at the time of the calls, and indebted by virtue of the deed of settlement. We think he was not ; the cases cited are inapplicable. There is no statute laying down an arbitrary rule to govern this case. The question is at common law, and we are of opinion he is not liable as alleged, unless he had executed the deed. There may be evidence that he agreed with the promoters to become a shareholder to execute the deed, or even that he so agreed with the plaintiffs, but that is not the case put forward in the declaration. Nor is this a mere formal objection. Had the defendant been charged on such an agreement the question would be wholly different, the defence might be different, the damage, if any, different.

We think the judgment should be affirmed.

Judgment affirmed.

1861.

IRISH PEAT
Company
v.
PHILLIPS.

1861.

MEMORANDA.

In this Vacation,

John Baron Campbell, Lord High Chancellor, died suddenly on the morning of *Sunday*, the 23d *June*, at his residence, *Stratheden House, Knightsbridge*.

Sir *Richard Bethell*, Attorney General, was thereupon appointed Lord High Chancellor, and was created a peer by the title of Baron *Westbury*, of *Westbury*, in the county of *Wilts*.

Sir *William Atherton*, Solicitor General, succeeded to the office of Attorney General: and *Roundell Palmer* Esq., one of Her Majesty's Counsel, was appointed Solicitor General. He afterwards received the honour of knighthood.

Edwin John James Esq., one of Her Majesty's Counsel, was disbarred by the benchers of the Honourable Society of the *Inner Temple*.

END OF TRINITY VACATION.

CASES

1861.

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

MICHAELMAS TERM,

XXV. VICTORIA.

The Judges who usually sat in Banc in this
Term were:

COCKBURN C. J.		BLACKBURN J.
WIGHTMAN J.		

HILL J. was absent during the whole Term, owing to
ill health.

WILLSMER against JACKLIN.

*Saturday,
November 2d.*

1. Under the Insolvent Debtors Act, 1 & 2 Vict. c. 110., it is not a condition on the non-vesting in the assignees of privileged articles of the insolvent not exceeding the value of 20*l.*, that those articles be specified by him in his schedule.

2. *Quere*, when the value of such articles exceeds 20*l.*

*Insolvent
debtor.
1 & 2 Vict.
c. 110.
Privileged
articles.*

THIS was an action for the conversion of the plaintiff's goods; to which the defendant pleaded the general issue and a traverse of the plaintiff's possession.

1861.

WILLSMER
V.
JACKLIN.

On the trial, before *Williams J.*, at the *Surrey Summer Assizes*, 1861, it appeared that, on the 26th *July*, 1860, the plaintiff, according to the provisions of the 1 & 2 *Vict. c. 110.*, petitioned the Court for the relief of insolvent debtors to be discharged from his liabilities. A vesting order was made accordingly, and the defendant appointed trade assignee; and on the 9th *July* a final order was made for the discharge of the plaintiff at the expiration of nine months from the date of the vesting order. The defendant having, as assignee, taken possession of the plaintiff's property, and sold it for the benefit of the creditors, under section 42 of the statute, the plaintiff brought the present action against him to recover the value of certain privileged articles, alleged to have been sold among the rest. In his schedule, however, the plaintiff had not specified any articles which he claimed to retain as privileged. Under these circumstances a verdict was taken for the plaintiff for 9*l.*, with leave reserved to the defendant to move to enter a nonsuit.

Hawkins now moved accordingly.—There was no evidence to shew that these articles were excepted from the operation of the Insolvent Debtors Act, 1 & 2 *Vict. c. 110.* Sect. 37 of that statute enacts: "Upon the filing of such petition by such prisoner, or on the filing of such petition by such creditor or creditors as aforesaid, and the evidence in support thereof, as the case may be, it shall be lawful for the said Court for the Relief of Insolvent Debtors, and such Court is hereby authorized and required, to order that all the real and personal estate and effects of such prisoner, both within this realm and abroad, except the wearing apparel, bedding, and other such necessities of such person and his

family, and the working tools and implements of such prisoner, not exceeding in the whole the value of 20*l.* ; and all the future estate, right, title, interest, and trust of such prisoner in or to any real and personal estate and effects within this realm or abroad which such prisoner may purchase, or which may revert, descend, be devised or bequeathed, or come to him, before he shall become entitled to his final discharge in pursuance of this Act, according to the adjudication made in that behalf ; &c., and all debts due or growing due to such prisoner, &c., shall be vested in the provisional assignee for the time being of the estates and effects of insolvent debtors in *England*, &c. ; and such order when so made shall, without any conveyance or assignment, vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, &c., in the said provisional assignee, &c." That section must, however, be read in connection with sect. 69, which enacts : " Every prisoner whose estate shall, by an order to be made under this Act, be vested in the provisional assignee of the said Court for the relief of insolvent debtors (whether upon his own petition or on the petition of any such creditor as aforesaid), shall, within the space of fourteen days next after such order shall have been made, or next after notice in writing of such order having been made shall have been given to him, in case such order shall not have been made on his own petition, or within such further time as the said Court shall think reasonable, deliver in to the said Court a schedule, containing a full and fair description of such prisoner, as to his name or names, trade or trades, profession or professions, to-

1861.

WILLSNER
v.
JACKLIN.

1861.

WILLSMER
v.
JACKLIN.

gether with the last usual place of abode of such prisoner, and the place or places where he has resided during the time when his debts were contracted; and also a full and true description of all debts due or growing due from such prisoner at the time of making such order, &c.; and also a full, true, and perfect account of all the estate and effects of such prisoner, real and personal; . . . and also shall fully and truly describe the wearing apparel, bedding, and other necessities of such prisoner, and his or her family, and the working tools and implements of such prisoner, not exceeding in the whole the value of 20*l.*, which may be excepted by such prisoner from the operation of this Act, together with the values of such excepted articles respectively;” &c. The object of the statute was to vest in the assignee by the vesting order all the property of the insolvent, except such articles of wearing apparel, working tools and implements, not exceeding 20*l.* in value, as should be expressly specified by the insolvent in his schedule. Now the property in respect of which this action is brought was not so specified, and consequently became vested in the assignee. If this were not so, in whom would the property in those articles be vested in the interval between the vesting order and filing the schedule? Besides, suppose the insolvent possessed articles of the privileged class to an amount exceeding 20*l.*, how would it be possible to tell which of those articles vested in the assignees and which remained in the insolvent? Moreover, an insolvent may not desire to exercise his right of claiming any articles. In *Lea v. Telfer* (a) it was held, under the old Insolvent Debtors Act, 1 G. 4. c. 119., that an insolvent could not

(a) 1 Car. & P. 146.

maintain an action for property which he had before his insolvency, even though the assignee did not interfere to prevent him. The more recent Act, 7 & 8 Vict. c. 96., "to amend the law of insolvency, bankruptcy and execution," by sect. 9 enacts: "The wearing apparel, bedding, and other necessities of the petitioner and his family, and the working tools and implements of the petitioner, not exceeding in the whole the value of 20*l*., may be excepted by the petitioner in his petition from the operation of the said recited Act," (5 & 6 Vict. c. 116.), "and of this Act, and in such case shall be altogether excluded from the operation of the said Acts: Provided always, that such excepted articles, with the values thereof respectively, to be ascertained and appraised, if the Commissioner shall think fit, in such manner as he shall direct, be fully and truly described by the petitioner in his schedule, but otherwise the exception thereof shall be of no force as to any part of the same." In *Taylor v. Roberts* (a), under that statute, where an insolvent claimed as excepted articles "Sundry articles of furniture, worth in my estimation about 15*l*., " it was held insufficient, as he was bound to specify each article, and state its value.

1861.

WILLIAMS

v.
JACKLIN.

COCKBURN C. J. I am of opinion that there ought to be no rule in this case. The 37th section of the Insolvent Debtors Act, 1 & 2 Vict. c. 110., expressly excepts from vesting in the provisional assignee under the vesting order articles of wearing apparel, and working tools and implements of the insolvent, to the amount of 20*l*. It is true the 69th section requires that in his schedule the insolvent shall state if he claims the benefit of the exception which the statute gives in respect of

(a) 1 H. & N. 96.

1861.

WILLMER
v.
JACKLIN.

privileged articles, but it does not make his doing so a condition on which the question whether section 37 is to come into operation or not is to depend; and as such a condition is not to be found in any other section of the statute, we cannot construe it as containing one. And, although it may be urged that this construction of the statute will enable insolvents to work frauds on their creditors, it is not for us to supply what the Legislature has not supplied.

WIGHTMAN J. I think it may be taken for granted, though it is not directly admitted, that there is nothing here to shew that the value of the excepted articles claimed by the insolvent exceeded 20*l.*; consequently the insolvent is entitled to claim articles to that amount; and those articles have not vested in the assignees under section 37 of the 1 & 2 *Vict. c. 110.*, as the rest of the property of the insolvent has done. It is unnecessary to consider the case put by Mr. *Hawkins*, namely, supposing these articles were mixed with others of the same kind, the total value of the whole amounting to a sum exceeding 20*l.*, so that the question would be which are the goods claimed by the insolvent. Some difficulty might arise there; but in the present case there is none, the only point being, did these articles vest in the assignees or not?

BLACKBURN J. The 37th section of stat. 1 & 2 *Vict. c. 110.* vests in the assignees all the personal estate of the prisoner, except wearing apparel, working tools and implements, not exceeding the value of 20*l.* Now, if the fact were that the working tools, &c., of the insolvent did exceed the value of 20*l.*, the question might

arise, which portion of them not exceeding the value of 20*l.* should belong to the prisoner, and which to the assignees. I am not prepared to express an opinion on that. It is unnecessary to do so, for on the evidence as it stands the whole of the working tools, &c., of the insolvent are not shewn to have exceeded the value of 20*l.* Then the only question is, whether the 69th section of this Act makes it a condition on the non-vesting of these kinds of property in the assignees that the insolvent shall truly describe in his schedule the articles which he claims. Such words are found in stat. 7 & 8 *Vict.* c. 96. s. 9., which was cited by Mr. *Hawkins*; but they are not in this Act; though it might have been more convenient if they had been inserted.

Rule refused.

The QUEEN *against* KIRBY.

Thursday,
November 7th.

Where a person is assessed to the poor rate in respect of his own property, and is also executor of a person whose executors are assessed in respect of property of the deceased, he is entitled to vote at a vestry, under 58 G. 3. c. 69., if the two assessments amount to 25*l.*

Voting in vestry.
58 G. 3. c. 69.
Joining qualifications.
Executor.

HUDDLESTON had obtained a rule, in *Trinity* Term, calling on *George Kirby* to shew cause why an information, in the nature of a quo warranto, should not be exhibited against him, to shew by what authority he claimed to exercise the office of vestry clerk of the parish or township of *Bicester Market End*, in the county of *Oxford*, on the ground that he had not a legal majority of votes at the election to that office.

It appeared that the provisions of stat. 13 & 14 *Vict.* c. 57., relative to the appointment of vestry clerks, had

1861.

The QUEEN
v.
KIRBY.

been applied to and were in force in the parish or township of *Bicester Market End*; and that, at a meeting for the purpose of electing a vestry clerk under section 6 of that Act, *George Kirby*, one of the candidates, obtained a majority over his opponent. Some of the votes were disputed, on grounds to which it is unnecessary to refer; for the question ultimately resolved itself into this, whether *William Palmer*, who voted for *Kirby*, was entitled to one vote or two. He was assessed to the last rate for the relief of the poor for 27*l.* 10*s.* in respect of a house and premises in his occupation, which it was admitted gave him one vote. He was also assessed in 21*l.* 15*s.* for another property, and was also one of the two executors of *W. Finch*, whose executors were rated at 12*l.*, and the question was whether, as these two sums together amounted to 25*l.*, he thereby became entitled to a second vote.

Lush and *Field* shewed cause.—The third section of the 58 *G. 3. c. 69.*, “For the regulation of parish vestries,” enacts: “In all such vestries every inhabitant present, who shall, by the last rate which shall have been made for the relief of the poor, have been assessed and charged upon or in respect of any annual rent, profit or value, not amounting to 50*l.*, shall have and be entitled to give one vote and no more; and every inhabitant there present, who shall in such last rate have been assessed or charged upon or in respect of any annual rent or rents, profit or value, amounting to 50*l.* or upwards (whether in one or more than one sum or charge), shall have and be entitled to give one vote for every 25*l.* of annual rent, profit and value upon or in respect of which he shall have been assessed or charged in such

last rate, so nevertheless that no inhabitant shall be entitled to give more than six votes; and in cases where two or more of the inhabitants present shall be jointly rated, each of them shall be entitled to vote according to the proportion and amount which shall be borne by him of the joint charge; and where one only of the persons jointly rated shall attend he shall be entitled to vote according to and in respect of the whole of the joint charge." The question here has never been raised before; but there is no reason why this person should not join the property he holds in his personal with that which he holds in his representative character, so as to make up the amount which entitles him to vote. The statute does not say that the property in respect of which a man votes shall consist of one tenement or many; the object of it was to give every person a number of votes proportionate to his stake in the parish. The provision in the section that, where two or more inhabitants are jointly rated, each shall be entitled to vote according to his proportion of the joint charge, favours this construction.

It does not appear in the present case whether the co-executor of *Palmer* was present at the meeting; but, even if he were, *Palmer* is entitled to vote in respect of half the property of his testator, which, together with his own, will make up the qualification.

Huddleston and *Sawyer*, in support of the rule.—The statute requires the party voting to be "assessed and charged" to a certain amount. Here, as to part of the property, he is not "assessed and charged;" but the assessment and charge are on the executors of a person deceased. The Legislature did not intend that qualifi-

1861.

The QUEEN
v.
KIRBY.

1861.

The QUEEN
v.
KIRBY.

cations in *different rights* should be joined for this purpose. The provision in the section relied by on the other side only applies to the case where partners are rated.

COCKBURN C. J. This rule must be discharged. It turns entirely on the question whether the voter, *William Palmer*, was entitled to two votes or one. It is admitted on all hands that he was entitled to one; so that the question resolves itself into this, was he entitled to a second on the facts disclosed?

It appears that he had some property to which he was assessed to the poor rate in his individual capacity, but not sufficient to make out a qualification for a second vote, and accordingly, in order to enable him to give a second vote, he proposed to add to it another assessment by which he was assessed to the poor rate as executor of *W. Finch*. The two qualifications put together make up more than enough to give the value, and the point therefore is whether, for this purpose, property held by a man in his individual capacity can be added to that held by him in his capacity of executor. Looking to the statute 58 G. 3. c. 69., on which this question turns, it is very plain that the intention of the Legislature was that parties assessed to the poor rate should vote at vestries in respect of the amount of the property to which they are assessed; and it has been fairly admitted, and may be taken as established, that properties in the same right may be put together to make up the necessary amount. If this be so, what is there to prevent an executor voting in vestry if the property held by him as such, and duly assessed, is sufficient in value. I do not see anything in the Act, or in its policy, to prevent that, nor any reason why he should be excluded. His

property is equally liable to the rate with that of any other person, and ought to be represented accordingly. I think this case comes within both the letter and the spirit of the Act.

1861.

The QUEEN
v.
KIRBY.

WIGHTMAN J. I am of the same opinion, and for the same reasons.

BLACKBURN J. Although the name of *W. Palmer* does not appear on the rate for a portion of this property, yet *Finch's* executors are charged for it, and it is open to him to shew that he is one of them. I cannot see any difference between the property being stated as belonging to *Finch's* executors and its being put down under the name of *W. Palmer* and that of his co-executor. I do not think it necessary to consider whether the co-executor of *Palmer* was present at this vestry; for, suppose he were (so as to reduce the qualification to the lowest amount), *Palmer* would still be entitled to 6*l.* in respect of this property, and that, taken with what he has in his own right, raises the sum above 25*l.*, and he therefore would have a right to a second vote unless there is something in the statute to prohibit him. The words of the statute appear to me to express that, although a person is jointly charged, he may still vote if his proportion of the joint charge added to the amount of his own property is sufficient.

More express words might have been made use of, but enough is stated to shew that intention; and, as my Lord Chief Justice said, this construction likewise carries out the spirit of the Act.

Rule discharged.

[1860.]

[Tuesday,
November 13th,
1860.]

SOMMERVILLE *against* WILLIAM MIREHOUSE and
another, Esquires (a).

*Church rate.
Limitation of
complaint.*

11 & 12 Vict.
c. 43. s. 11.

*Action against
justices.*

11 & 12 Vict.
c. 44. s. 1.

Declaration against justices of the peace alleged that the plaintiff was rated to a church rate, which was demanded on the 8th September 1857; that the plaintiff was summoned for non payment thereof on the 5th May 1859; that at the hearing, on the 12th May 1859, the plaintiff gave evidence that the rate had been demanded of him and the matter of complaint had arisen more than six months before the complaint, and contended that, by stat. 11 & 12 Vict. c. 43. s. 11., the defendants had no jurisdiction: yet the defendants made an order for payment of the rate, which order had been quashed. Plea, that upon the hearing of the complaint it was proved that, besides the demand of the rate in the declaration mentioned, the same was again demanded on the 25th March 1859, and the complaint was laid within six calendar months from the time of that demand. Upon demurrer, held, that it was within the duty of the defendants, as justices, to determine the question whether a complaint was made within the time limited; and therefore, by sect. 1 of stat. 11 & 12 Vict. c. 44., the action was not maintainable without proof of malice and want of reasonable and probable cause.

THE declaration alleged that the defendants were two of Her Majesty's justices of the peace for the county of Gloucester, and the plaintiff was an occupier of a paper mill, lands, buildings and premises in the hamlet of *Bitton*, in the parish of *Bitton*, in the county aforesaid, and rated in respect thereof to a church rate for the said hamlet, which was and is a place making its own church rates, in the sum of 1*l.* 4*s.* 0½*d.*, which church rate was made on the 3d February, 1857, and was duly demanded by the churchwardens of the said hamlet, from the plaintiff, on the 8th September, 1857; and which church rate the plaintiff then and there refused to pay; and the plaintiff was in due form of law

(a) This case was cited in the next case, and is therefore reported out of its order.

required, by a summons in that behalf under the hand and seal of one of Her Majesty's justices of the peace for the said county, bearing date the 5th *May*, 1859, and duly served upon the plaintiff, to appear on the 12th *May*, 1859, before Her Majesty's justices of the peace for the said county at the Sessions Room, *Lawford's Gate*, in the said county, to answer to the complaint and information of *A. S.*, one of the churchwardens of the said hamlet, that the plaintiff had neglected and refused to pay the sum aforesaid, to which it was alleged in the summons that the plaintiff was rated in the said church rate, the validity of which rate it was further alleged in the summons had not been questioned in any Ecclesiastical Court. And the plaintiff duly attended in obedience to the summons, at the time and place therein mentioned, before the defendants then and there being and acting as two of Her Majesty's justices of the peace for the county of *Gloucester*; and the matter of the complaint and information was then entered into and heard by and before the defendants so being and acting as such justices; and evidence was given to the said justices by and on behalf of the said *A. S.*, as such complainant as aforesaid, in support of the information and summons; and the plaintiff then and there proved to the defendants then being and acting as such justices, and tendered and produced evidence before the defendants then being and acting as such justices, which was wholly uncontradicted and undisputed, and to which there was no evidence whatever in reply, that the said church rate had been demanded of the plaintiff, and that the matter of the complaint and information aforesaid had arisen more than six calendar months before the complaint and information were made

[1860.]

SOMMERVILLE
v.
MIREHOUSE.

[1860.]
SOMMERVILLE
V.
MIREHOUSE.

and laid, to wit, on the 8th *September*, 1857, as aforesaid; and the plaintiff, by his attorney, then read to the defendants, then being and acting as such justices, the words of the statute in that case made and provided, to wit, the 11 & 12 *Vict. c. 43. s. 11.*, and told the defendants that they had no jurisdiction, as such justices, in the matter of the complaint and information, for the reason aforesaid, and required them to dismiss the summons, and to make no order for the payment of the sum thereby demanded. Yet the defendants, professing and assuming to act as such justices, but having no right, authority or jurisdiction so to do, proceeded to make, and did make, an order, under their hands and seals, whereby they ordered and appointed the plaintiff to pay or cause to be paid unto the churchwardens of the hamlet of *Bitton*, the sum of 1*l.* 4*s.* 0*½d.*, and the further sum of 10*s.* for such costs and charges of the said churchwardens concerning the premises, as upon the merits of the cause did appear to them, the defendants, just and reasonable; which order had since then and before the commencement of this action been duly quashed by Her Majesty's Court of Queen's Bench for the causes aforesaid. The declaration, after an averment that all things had been done by the plaintiff and had happened to entitle him to recover in this action, concluded thus: "And the plaintiff says that, by reason of the unlawful act of the defendants in professing and assuming to act as such justices as aforesaid, and in making the said order in the matter aforesaid, whereof as aforesaid they had no jurisdiction, and by reason of the plaintiff being liable to be proceeded against further in the matter of the said complaint and information, and to have his goods distrained

upon if he should not obey the order as aforesaid, so long as the same remained of full force and not quashed, the plaintiff has been put to great inconvenience and annoyance, and has also been put to great loss and expense, and has necessarily incurred great costs in and about applying to Her Majesty's Court of Queen's Bench for a writ of certiorari to remove the said order into the said Court, and for a rule to quash the said order, and in and about the proceedings necessarily incidental thereto."

[1860.]

SOMMERVILLE
v.
MIREHOUSE.

Plea, that upon the hearing of the complaint by the defendants, as in the declaration mentioned, it was proved on behalf of the said *A. S.*, to them the defendants, and which proof was undisputed by the plaintiff, that besides the demand of the rate in the declaration mentioned, the same was again demanded by the said *A. S.*, being then one of the churchwardens of the said hamlet, on the 25th *March*, 1859, and that the plaintiff then again neglected and refused to pay the same, and that the said last mentioned information and complaint was laid within six calendar months from the time when the last mentioned demand and refusal took place, and the said *A. S.* on the said hearing relied on the last mentioned demand, and neglect and refusal, as the ground of this complaint.

The defendants also demurred to the declaration.

Issue on the plea, and demurrer thereto.

Joinder in demurrers.

Gray, for the defendants.—Assuming that the cause of complaint was complete on the first demand of the rate, and that a second demand could not be made so as to take the case out of sect. 11 of stat. 11 & 12 *Vict.*

[1860.]
 SOMMERSVILLE
 v.
 MIREHOUSE.

c. 43., and therefore the order, being made without jurisdiction, was properly quashed, still this action will not lie. First, an action will not lie against justices for making an invalid order, if they honestly made a mistake in law; *Harman v. Tappenden* (a), *Ackerley v. Parkinson* (b), per Lord *Kenyon*. Secondly, the plaintiffs are protected by stat. 11 & 12 *Vict. c. 44*. The action cannot be maintained under sect. 1, because the declaration does not allege that the act which is the cause of action was done maliciously, and without reasonable and probable cause. Sect. 2 enacts, that "for any act done by a justice of the peace in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction or order made or warrant issued by such justice," may maintain an action against such justice, "as he might have done before the passing of this Act, without making any allegation in his declaration that the act complained of was done maliciously, and without reasonable and probable cause." But that section only reserves the right of action for any act done under the order, and was not intended to give a new cause of action against justices. The costs of bringing up the order for the purpose of quashing it constitute a *damnum absque injuriâ*.

The Court then called upon

Lush, for the plaintiff.—The justices, in making their order upon a complaint made more than six months from the first demand and refusal, acted without jurisdiction; for, although they had jurisdiction over the subject matter, it appeared in the course of the inquiry

(a) 1 *East*, 555, 561, 562.

(b) 3 *M. & S.* 411.

before them that they had none to make the order. [Cockburn C. J. They made a judicial mistake in deciding that a sufficient complaint was made within the time limited by sect. 11 of stat. 11 & 12 *Vict. c. 43.*: the principle of immunity for judicial acts applies to this case. *Hill J.* The rule is laid down thus in *Linford v. Fitzroy (a)*: "The broad line of distinction is this; that unless the duty of the magistrate is simply and purely ministerial, he cannot be made liable to an action for a mistake in doing or omitting to do any thing in the execution of that duty, unless he can be fixed with malice." [Cockburn C. J. It was within the duty of the justices to determine the question which was raised in this case before them: indeed that question was a matter which they were bound to decide. *Hill J.* If anything had been done under the order it might be different: as soon as an invalid order is acted upon a trespass is committed.] The point as to jurisdiction is the same whether the order is acted upon or not. [*Hill J.* There is no injuria until a seizure of the plaintiff's goods is made in execution of the order. *Cockburn C. J.* There was a good cause of complaint before the justices, but a statute of limitations prevented it from being proceeded upon.] If justices decide wrongly as to their jurisdiction they are liable to an action for an act which they do in consequence.

[1860.]

 SOMMERVILLE
 V.
 MIREHOUSE.

Per CURIAM (COCKBURN C. J. and HILL J.)

Judgment for the defendants.

(a) 13 Q. B. 240. 247.

1861.

Friday,
November 8th.

PEASE and others *against* HENRY CHAYTOR,
Esquire, and another.

Church rate.
53 G. 3. c. 127.
s. 7.
Validity of
rate disputed.
Quaker.
Action against
justices.
11 & 12 Vict.
c. 44. ss. 1, 2.

Declaration against justices of the peace alleged that the plaintiffs were rated to a church rate, the validity of which rate was disputed by them; that they were summoned for non payment of the rate; that at the hearing before the defendants the plaintiffs, in good faith disputing the validity of the rate, gave the defendants notice thereof: yet the defendants, not acting *bonâ fide* in the belief that they were acting in conformity to law, and when they well knew that they had not jurisdiction to proceed, made an order for payment of the rate, which order was afterwards quashed, and issued their warrant of distress, by virtue of which the goods of the plaintiffs were distrained. Plea, as to the distraining of the goods of the plaintiffs; that the warrant was issued on the application of the churchwardens, and executed by their direction as well as by the command of the defendants; and that the plaintiffs afterwards recovered judgment in replevin against the churchwardens. Upon demurrer, held,

1. That the allegations in the declaration sufficiently shewed that the defendants knew that the validity of the rate was *bonâ fide* disputed, and that proper notice thereof was given to them; and therefore, by the proviso to sect. 7 of stat. 53 G. 3. c. 127., they acted without jurisdiction in making the order and warrant.

2. The action was, therefore, by sect. 2 of stat. 11 & 12 Vict. c. 44., maintainable without proof of malice and want of reasonable and probable cause.

3. *Semble*, per *Blackburn J.* If the defendants acted erroneously under the belief that the validity of the rate was not *bonâ fide* disputed, the action would be within sect. 1 of stat. 11 & 12 Vict. c. 44.

4. The proviso in sect. 7 of stat. 53 G. 3. c. 127., which takes away the jurisdiction of justices where the validity of the rate is *bonâ fide* disputed, extends to Quakers.

THE first count of the declaration (dated 27th June 1859) alleged that the defendants were two justices of the peace for the county of *Durham*, and the plaintiffs were lessees and occupiers of a colliery and premises in the chapelry of *St. Helen's, Auckland*, in the said county, and the plaintiffs, by a certain name or style, that is to say "*Joseph Pease and others, or Company, owners of St. Helen's Colliery,*" were rated to a church rate for the said chapelry, in a certain sum, that is to say, 8*l.*, the validity of which rate was, at the time of the making of

the rate, and from thence hitherto has been and still is, disputed by the plaintiffs; that the plaintiffs were summoned to answer a complaint that they had refused to pay the sum of 8*l.* 5*s.* 4*d.*, being the amount of the said sum of 8*l.*, together with another sum of 5*s.* 4*d.*, to which the plaintiffs had also been rated in like manner as aforesaid to the said church rate, the validity of which they disputed; that they, by their agent, attended pursuant to the summons, and the hearing of the complaint was adjourned to the 6th *January*, A. D. 1859, and upon that day they again attended by their agent before the defendants, and the matters of the complaint were then entered into and heard by the defendants. "And the plaintiffs say, that at the time of the hearing of the matters of the said complaint, they the plaintiffs in good faith, truth and sincerity, disputing and intending to dispute the validity of the said rate, upon the hearing of the said complaint by their said agent, gave to the defendants, then being and acting as such justices as aforesaid notice, that they the plaintiffs disputed the validity of the said rate, and required the defendants, as such justices as aforesaid, to forbear from and not to give judgment in respect of the matters of the said complaint. And the plaintiffs further say that, upon the said hearing of the said complaint by the defendants as such justices as aforesaid, there was not evidence given to or before the defendants that they the plaintiffs did not, in fact or in good faith, dispute the validity of the said rate, or that they did not give such notice to the defendants as aforesaid. Yet the plaintiffs in fact further say that the defendants afterwards; and not acting bonâ fide in the belief that they were acting as such justices as aforesaid, or that they were acting in conformity to

1861.

PRASE
V.
CHAYTOR.

1861.

PEASE
v.
CHAYTOR.

law, but wilfully, wrongfully and of set purpose disregarding the said notice, and the duty of the defendants as such justices as aforesaid, and knowingly and wilfully disregarding and disobeying the statute in such case made and provided, and wrongfully and oppressively, and contrary to law, assuming to act as such justices as aforesaid in the matters of the said complaint when they had not, and when they well knew they had not, jurisdiction to proceed farther thereupon, or to make or give any order, direction or judgment upon the said matters of the said complaint, and notwithstanding such disputing by the now plaintiffs, and such notice thereof to them the defendants given as aforesaid; proceeded to give, and did give, judgment in respect of the matters of the said complaint, and did then make a certain order in writing, under the hands and seals of them the defendants, for the payment by the plaintiffs of the said sum of 8*l.*, together with a sum of money for costs, in which order the plaintiffs were described by the name or style of '*Joseph Pease and others, owners of Saint Helen's Colliery*;' and which said order by the defendants so made as aforesaid was as follows." [The order was set out, dated the 6th *January* 1859.] That the said order was removed into this Court by certiorari, and before the commencement of this suit was quashed. "That after the making of the said order by the defendants so made unlawfully and without jurisdiction as aforesaid, and before the removal thereof into the said Court here as aforesaid, the defendants, having notice of the premises aforesaid, and that the said order was null and void, and of no force or effect in law, and that they the defendants, as such justices as aforesaid, had no jurisdiction, power or authority to act further in the

matters of the said complaint as aforesaid, and no jurisdiction, power or authority by distress and sale of the goods of the plaintiffs or otherwise howsoever to levy the said sums of money by the said order of the defendants, so wrongfully and unlawfully ordered to be paid by the plaintiffs as aforesaid. Yet the plaintiffs in fact further say that the defendants further, wilfully, wrongfully and unlawfully assuming to act as such justices as aforesaid, and for the purpose of unlawfully and wrongfully levying the amount of the said sums of money in and by the said order so unlawfully and wrongfully ordered to be paid as aforesaid by distress and sale of the goods of the plaintiffs, by their warrant under the hands and seals of them the defendants, and directed to the constable of *West Auckland* and all other peace officers in the said county of *Durham*, did wrongfully and unlawfully command the said constable and peace officers in Her said Majesty's name forthwith to make distress of the goods and chattels of the plaintiffs, who were therein described as *Joseph Pease* and others, and which said warrant of the defendants was and is in these words." [The warrant, which was set out, was dated the 3d *February* 1859, and described the plaintiffs as "*Joseph Pease* and others, owners of *St. Helen's Colliery*, in the said county, being persons commonly called Quakers."]

"And by virtue of which said warrant of the defendants so wrongfully and unlawfully made and issued, and delivered to the said constable and peace officers as aforesaid," divers of the cattle, goods and chattels of the plaintiffs were unlawfully and wrongfully seized, taken and distrained, whereby the plaintiffs were obliged to apply, and did apply for and obtain, a writ of certiorari to remove the said order into this Court, and were also

1861.

 PEASE
 V.
 CHAYTOR.

1861.

PEASE
v.
CHAYTOR.

obliged to apply and did apply for and obtain a rule to quash the said order, and were also obliged to cause the said order to be, and the same was, accordingly quashed; and the plaintiffs were put to and incurred great expences, costs and charges &c.

Second plea, to so much of the causes of action in the first count of the declaration mentioned as relates to or were occasioned by the seizing, taking and distraining of the cattle, goods and chattels of the plaintiffs as in the said count mentioned: the defendants say that the said warrant by virtue of which the said cattle, goods and chattels were so seized, taken and distrained was applied for and was issued on the application, at the instance and on the behalf of *D. V.* and *T. S.*, then being the churchwardens of the said chapelry, and the said warrant was executed, and the said cattle, goods and chattels were so seized, taken and distrained, by and by the direction and order and on the behalf of the said *D. V.* and *T. S.*, as well as by the command of the defendants. And the defendants further say that, after the cattle, goods and chattels were so seized, taken and distrained, the plaintiffs commenced and levied a plaint or action of replevin in the county court of *Durham*, holden at *Bishop Auckland*, in the said county, against the said *D. V.* and *T. S.*, for and in respect of the said seizing, taking and distraining of the said cattle, goods and chattels, and the damages thereby occasioned to the plaintiffs, and thereupon, by virtue of certain process issued out of and by the last mentioned court, the said cattle, goods and chattels were replevied and re-delivered to the plaintiffs; and such proceedings were thereupon had in the said plaint or action that afterwards it was considered in and by the last mentioned

court that the plaintiffs should recover against the said *D. V.* and *T. S.*, 1*l.* 18*s.* for the said seizing, taking and distraining of the said cattle, goods and chattels and damages, and 2*l.* 3*s.* 4*d.* for the costs and charges of the plaintiffs in and about the last mentioned suit, as by the proceedings in the last mentioned Court appears, which said judgment still remains in full force and effect and not in the least reversed or made void.

The defendants also demurred to the first count.

Demurrer to the second plea.

Joinder in demurrers.

1861.

PEASE
v.
CHAYTOR.

Hindmarch, for the plaintiffs.—Section 7 of stat. 53 *G.* 8. c. 127., which gives power to justices of the peace to enforce the payment of a sum not exceeding 10*l.* due upon a church rate, contains a proviso “that if the validity of such rate, or the liability of the person from whom it is demanded to pay the same, be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment thereupon, and the person or persons demanding the same may then proceed to the recovery of their demand, according to due course of law, as heretofore used and accustomed.” The effect of the proviso is that, as soon as it appears that there is a question as to the validity of the rate, the summary jurisdiction is at an end (*a*). It is alleged in the declaration that, at the hearing of the complaint, the validity of the rate was *bonâ fide* disputed by the plaintiffs, and that is admitted by the demurrer to the declaration. Consequently the act of issuing the warrant of distress upon the goods of the plaintiffs was not an act done by

(*a*) See *Ricketts v. Bodenham*, 4 *A. & E.* 433. 443.

1861.

 PEASE
 v.
 CHAYTOR.

the justices in the execution of their duty with respect to a matter within their jurisdiction, which is protected, if not done maliciously and without reasonable and probable cause, by sect. 1 of stat. 11 & 12 *Vict. c. 44*; but was an act done by them in a matter, of which by law they had not jurisdiction, and therefore the action lies, by sect. 2, without an allegation in the declaration that the act was done maliciously and without reasonable and probable cause. In *Leary v. Patrick* (a) there was a conviction by justices, adjudging the plaintiff to pay a penalty, but silent as to costs, and, a distress warrant having issued for the penalty and costs, it was held that the seizure of the plaintiff's goods was an excess of jurisdiction for which an action of trespass lay under sect. 2. Lord *Campbell* said, p. 272: "Stat. 11 & 12 *Vict. c. 44. s. 2.* leaves the remedy of a party injured the same as it would have been before that Act, in cases in which justices have acted without jurisdiction or have exceeded their jurisdiction, provided that the conviction has been quashed before action." In *Barton v. Bricknell* (b), a conviction of the plaintiff directed that in case of non-payment of a penalty and costs, if there should not be sufficient distress, the plaintiff should be set in the stocks: after his goods were distrained, the conviction was quashed on account of the illegal alternative as to confinement in the stocks; and it was held that the defendant was protected by sect. 1 of stat. 11 & 12 *Vict. c. 44.* from an action of trespass for the distress; but the Judges intimated an opinion that, if the plaintiff had been put in the stocks under the illegal alternative, an action would have lain. [*Cockburn C. J.* That point

(a) 15 *Q. B.* 266.(b) 13 *Q. B.* 393.

was not necessary to be decided in that case. I am inclined to think that sect. 1 goes farther than the Judges there thought. *Wightman J.* Section 1 applies when the justice acts within his jurisdiction, but irregularly: section 2 when he acts without jurisdiction, or in excess of his jurisdiction.] Sect. 1 applies where a justice convicts a person without any evidence of the offence charged. *Sommerville v. Mirehouse (a)* will be cited for the defendants. In that case, upon a complaint to justices for non-payment of a church rate, it was contended that, there having been two demands of the rate, the first more than six months before the complaint, the cause of complaint was at an end when that demand was made; but the justices held that the second demand, which was made within six months, might be relied on as the ground of complaint, and made an order for payment. The order having been quashed, this Court held that an action against the justices was not maintainable, seeing that it was within their duty to determine the question whether there was a complaint within six months. [*Cockburn C. J.* In this case the justices would have to decide whether the notice that the validity of the rate was disputed was given *bonâ fide*.] Upon the pleadings it is admitted that there was a dispute. [*Blackburn J.* There is no averment in the declaration negating that the justices adjudicated on the ground that they did not believe that the notice was *bonâ fide* given.] That would come from the defendants by way of plea. The judgment of the justices, that notice was not given *bonâ fide*, would not be conclusive. [*Blackburn J.* But it would bring the case within sect. 1 of stat. 11 & 12 *Vict. c. 44.*, and take it out of sect. 2.

(a) 3 *L. T. N. S.* 294. Reported *supra*, p. 652.

1861.

PEASE
v.
CHAYTOR.

1861.

PEASE
v.
CHAYTOR.

Does this count charge more than that the defendants, without reasonable and probable cause, believed that there was no bonâ fide dispute?] The declaration negatives everything which would shew that there was not a bonâ fide dispute, and therefore the issuing the warrant was without jurisdiction.

Secondly, it will be said that the warrant of distress was issued against the plaintiffs as Quakers, and therefore the proceeding was under stat. 7 & 8 W. 3. c. 34. s. 4. But the order does not state that the plaintiffs were Quakers; and further stat. 53 G. 3. c. 127. s. 7. applies to Quakers. In *Backhouse*, app., *The Churchwardens of Bishopwearmouth*, resps. (a), on a case stated for the opinion of the Court of Common Pleas, it was held that, when a Quaker was summoned before justices, under stat. 7 & 8 W. 3. c. 34. s. 4., for non-payment of church rate, if he bonâ fide disputed the validity of the rate the jurisdiction of the justices was taken away by stat. 53 G. 3. c. 127. s. 7. [He did not argue in support of the demurrer to the second plea.]

Heath, for the defendants.—First, stat. 53 G. 3. c. 127. gives the justices a general jurisdiction for enforcing payment of a sum not exceeding 10*l.*, due upon a church rate, provided the validity of the rate or the liability of the person from whom it is demanded be not disputed. In this case the justices must have determined that the validity of the rate was not bonâ fide disputed, and therefore, by sect. 1 of stat. 11 & 12 Vict. c. 44., the declaration ought to have alleged that the acts which are the causes of action were done maliciously and with-

(a) 9 C. B. N. S. 315.

out reasonable and probable cause. [He cited *Tozer v. Child*, in error (a), *Garnett v. Ferrand* (b), *Hamond v. Howell* (c), there cited.] The statements in the declaration are not equivalent to such an allegation.

1861.

 PRASE
v.
CHAYTOR.

Secondly. No action lies against justices for a judicial act done by them in the execution of their office within their general jurisdiction; that is, in a case where they had jurisdiction at the commencement of the proceeding; *The Marshalsea Case* (d), *Bushell's Case* (e), per *Vaughan C. J.* In *Ackerley v. Parkinson* (f), where the defendant, as vicar general of the bishop, had excommunicated the plaintiff for not taking upon him administration of an intestate's effects, and the citation by which the plaintiff was cited was void, and the proceedings thereupon had been set aside, and there was no malice; the subject matter of the judgment being within the defendant's jurisdiction, it was held that no action would lie. [*Wightman J.* In that case the defendant had jurisdiction, but exercised it irregularly and erroneously.] *Barton v. Bricknell* (g) decided that, though the warrant was informal, yet, if the plaintiff did not suffer the portion of the sentence which was illegal he could not maintain an action. In *Sommerville v. Mirehouse* (h) the order must have been quashed on the ground of want of jurisdiction, though it appears that no cause was shewn against the rule for quashing it. [*Blackburn J.* The form of the order is not set out in the declaration in that case. In one sense there was want of jurisdic-

(a) 7 E. & B. 377.

(b) 6 B. & C. 611.

(c) 1 Mod. 184; 2 Mod. 218.

(d) 10 Rep. 68 b. 76 a.

(e) *Vaugh.* 135. 138, 139; *T. Jones*, 13. 15.

(f) 3 M. & S. 411.

(g) 13 Q. B. 393.

(h) Reported *supra*, p. 652.

1861.

 PEASE
 v.
 CHAYTOR.

tion in the justices to make the order; but if the certiorari is not taken away it is not necessary, in order to quash an order, that want of jurisdiction should be shewn on the face of the order. *Cockburn C. J.* It is sufficient that there is error in the proceeding. In *Sommerville v. Mirehouse*, it being required by sect. 11 of stat. 11 & 12 Vict. c. 43., that the complaint should be made within six months from the time of the demand, the justices adjudicated that there was a complaint within that time. In this case, by sect. 7 of stat. 53 G. 3. c. 127., the jurisdiction of the justices is taken away under the particular circumstance of the validity of the rate being disputed; and it does not appear that the justices decided that there was no bonâ fide dispute as to the validity of the rate.]

Thirdly. The defendants did not proceed under stat. 53 G. 3. c. 127. The warrant states that the plaintiffs were Quakers, and it is not alleged in the declaration that they are not Quakers. [*Cockburn C. J.* It is rather a startling proposition that Quakers are not in the same position as other subjects of the realm with reference to the enactment enabling persons summoned before justices of the peace for non-payment of church rate to dispute the validity of the rate.] Stat. 7 & 8 W. 3. c. 34. s. 4. gave a summary jurisdiction to enforce payment of church rates not exceeding 10*l.* against Quakers, and in that statute there is no such proviso as in sect. 7 of stat. 53 G. 3. c. 127. [*Cockburn C. J.* The Quaker cannot be deprived of the benefit of stat. 53 G. 3. c. 127., which applies to all the subjects of the realm, by its being said that the proceeding is taken under the former Act. The two statutes are inconsistent with each other, and

therefore the latter repeals the former. The plaintiff did not refuse payment of the rate on the ground of scruple of conscience: he disputed the validity of the rate.] It is submitted that the two statutes are not inconsistent. And, if the former is not repealed, the justices were not without jurisdiction, although they might intend to act under the latter statute. [*Blackburn J.* In *Backhouse*, app., *The Churchwardens of Bishopwearmouth*, resps. (a), the order for payment of the church rate was made upon the appellant as a Quaker; and therefore it is a stronger case than the present.] The Court will not consider itself bound by that decision, because there could not be an appeal from it (b). [*Cockburn C. J.* It is the decision of a Court of co-ordinate jurisdiction, and if you wish it to be reviewed you must go to a Court of error.]

Fourthly. The action was brought too late. By stat. 53 G. 3. c. 127. s. 12., every action brought "for any thing done in pursuance of this Act" "shall be commenced within three calendar months next after the fact committed." This declaration is not in trespass for seizing and taking the goods of the plaintiff; but alleges "by virtue of which said warrant of the defendants, so wrongfully and unlawfully made and issued," the goods and chattels of the plaintiffs "were unlawfully and wrongfully seized, taken and distrained." [*Wightman J.* The declaration may now be in case; though formerly, if the justices acted without jurisdiction, it would have been in trespass.] The making of the order and the warrant by the defendants constitute the cause of action complained of. [He cited *Theobald v. Crichmore*(c).] [*Cockburn C. J.* The

1861.

 PEASE
 V.
 CHAYTOR.

(a) 9 C. B. N. S. 315.

(b) See *Candlish v. Simpson*, ante, p. 367, per *Crompton J.*

(c) 1 B. & Ald. 227.

1861.

PRASE
V.
CHAYTOR.

making of the order and the warrant were only an inchoate cause of action, which was not complete till the goods of the plaintiffs were seized.]

Fifthly. If the seizure of the goods of the plaintiffs under the warrant, although not expressly alleged to have been done by the defendants, is the cause of action, the plea of judgment recovered in the replevin suit against the churchwardens, who were concerned jointly with the plaintiffs in that seizure, is an answer.

Hindmarch, in reply.—The order should have shewn that the proceeding was against a Quaker, if the justices did not act under stat. 53 G. 3. c. 127. As to the action being too late, it is not shewn on the record that the warrant was executed and the costs were incurred more than three months from the commencement of the action.

COCKBURN C. J. I am of opinion that the declaration is good, and that the demurrer must be overruled.

The whole question turns on the construction of stat. 53 G. 3. c. 127. s. 7., with reference to the facts as disclosed in the declaration; and we must take it as admitted on the record that, upon this complaint against the plaintiffs for non-payment of church rate coming on to be heard before the justices, the defendants, the plaintiffs *bonâ fide* disputed the validity of the rate, and gave the necessary notice thereof to the justices; that the justices, being satisfied that such notice was given and that there was a *bonâ fide* dispute as to the validity of the rate, nevertheless proceeded to adjudicate on the complaint. Jurisdiction in the matter of enforcing payment of church rate, as regards all the subjects of the Queen generally, was given to justices for

the first time by stat. 53 G. 3. c. 127. s. 7.; and in the same section follows this proviso. (His Lordship read it.) The effect of this enactment, coupled with the proviso, is to give jurisdiction to justices to enforce payment of church rate, by issuing their warrant of distress upon the goods of the party, except where the validity of the rate, or the liability of the person from whom it is demanded, is disputed, and the party gives notice thereof to the justices. I admit that the question whether the validity of the rate or the liability of the party is *bonâ fide* disputed, and whether notice of the intention to dispute it has been properly given to the justices, is a question on which it is competent for them to adjudicate. Such an answer to the complaint would be in the nature of a plea to the jurisdiction of the Court, and therefore within the competency of the Court before whom that plea was preferred to decide. But on the demurrer to this declaration, it must be taken that the justices had no cause to believe that the validity of the rate was not *bonâ fide* disputed; nor was there any ground for saying that due notice was not given to them of the intention to dispute the validity of the rate. Therefore, there being a valid plea to the jurisdiction of the Court, they were bound, in compliance with the proviso in sect. 7, to forbear giving judgment upon the complaint, and were in the same position as if the statute which gave them jurisdiction had never passed: in other words, they were deprived of jurisdiction in the matter. Notwithstanding, they made an order and issued their warrant, under which the plaintiffs' goods were seized; therefore this action may be maintained.

1861.

 PEASE
 V.
 CHAYTOR.

WIGHTMAN J. The plaintiffs in their declaration

1861.

PRASE
V.
CHAYTOR.

complain that the defendants, as justices, not having jurisdiction so to do, issued their warrant of distress, and caused the goods of the plaintiffs to be taken for payment of a church rate. The question is whether, in issuing their warrant and so causing the goods of the plaintiffs to be taken, the justices acted without jurisdiction, or whether they had jurisdiction to issue their warrant, and there has been merely a want of form or irregularity in the proceeding, which would make it necessary, in order to maintain an action against them, to allege that the act was done maliciously and without reasonable and probable cause. It appears to me, on the face of this declaration, that though in the first instance the defendants had jurisdiction to inquire into the complaint made by the applicants for a warrant of distress for payment of the church rate, yet, when they found that the plaintiffs *bonâ fide* intended to dispute the validity of the rate, their jurisdiction from that time ceased, and they ought to have held their hands and forbore from giving judgment in the case. If it had appeared on the face of the declaration, or might be inferred by reasonable construction from some allegations in it, that they had reasonable ground for believing that the plaintiffs did not *bonâ fide* dispute the validity of the rate, the question might have been different. But it is alleged that "the plaintiffs, in good faith, truth and sincerity disputing and intending to dispute the validity of the said rate upon the hearing of the said complaint," gave notice that they disputed the validity of the rate. Moreover, it is alleged that the defendants, "not acting *bonâ fide* in the belief that they were acting as such justices as aforesaid, or that they were acting in conformity to law," "and when

they well knew that they had not jurisdiction to proceed farther," nevertheless made an order and issued their warrant of distress. These allegations are admitted by the demurrer, and shew that the justices were proceeding, notwithstanding they knew that there was a bonâ fide dispute as to the validity of the rate. Stat. 53 G. 3. c. 127. s. 7., under which the proceedings were taken, contains a prohibition against their so proceeding, and therefore they acted without jurisdiction in making the order and in issuing their warrant: the act was coram non judice; and, consequently, the declaration may be supported, without an allegation that the warrant was issued maliciously and without reasonable and probable cause.

1861.

 PRASE
 V.
 CHAYTOR.

BLACKBURN J. I am also of opinion that judgment on the demurrer to this declaration ought to be given for the plaintiffs. Jurisdiction is given to justices of the peace to enforce the payment of church rates by sect. 7 of stat. 53 G. 3. c. 127., unless there is a dispute as to the validity of the rate or the liability of the person from whom it is demanded to pay it, and notice thereof be given to them. It appears sufficiently upon the face of this declaration that there was a bonâ fide dispute as to the validity of the rate, and that notice thereof was given to the justices by the party disputing the same, and therefore, according to the terms of the proviso in that section, they ought to have forbore giving judgment. There might be a case in which, though there was a bonâ fide dispute, the justices erroneously came to the conclusion that there was no bona fides and that a dispute did not exist, and then proceeded, notwithstanding their jurisdiction was taken away. In such

1861.

PEASE

v.

CHAYTOR.

a case I should think that their judgment would be void, because in fact a dispute did exist. But I should also think that, if they adjudicated under a belief that a dispute did not exist, they would be acting in the execution of their duty as justices with respect to a matter within their jurisdiction, and consequently would be entitled to the qualified protection of sect. 1 of stat. 11 & 12 *Vict. c. 44*, viz., that in an action brought against them it should be alleged and proved that the act was done maliciously and without reasonable and probable cause. At one time I doubted how the allegations in this declaration, which is of unnecessary length and prolixity, were to be understood ; but I now agree with my brother *Wightman* that those allegations, as admitted on the demurrer, must be read as asserting, not that the justices did not believe, though wrongly, that there was a *bonâ fide* dispute as to the validity of the rate, but that they, knowing that there was such a *bonâ fide* dispute, disregarded it and went on to adjudicate. Therefore they proceeded without jurisdiction, and are liable to this action.

Judgment for the plaintiffs on the demurrer to the declaration.

Judgment for the defendants on the demurrer to the plea.

1861.

In the matter of a plaint between ANN WEBB
YOUNG and The BROMPTON, CHATHAM, GIL-
LINGHAM and ROCHESTER Waterworks Com-
pany (limited).

*Monday,
November 18th.*

*County Court.
19 & 20 Vict.
c. 108. ss. 39.
70.
Stay of action.
Bond.
Corporation.*

By stat. 19 & 20 *Vict. c. 108. s. 39.*, in certain cases, if a defendant objects to the action being tried in the County Court, and gives security to be approved of by the registrar, the action shall be stayed; and by sect. 70 "such security shall be at the cost of the party giving it, and in the form of a bond, with sureties to the other party;" and in the form given in the Schedule of Forms to the Rules of Practice of the County Courts, the bond purports to be executed by the party and two sureties: Held,

1. That the registrar could not decline to approve a bond, on the ground that the defendant was, by law, incompetent to execute a bond.

2. That where the defendants were an incorporated joint stock Company, limited, it was within the scope of their general authority to execute such a bond.

IN this Term (*November 2d*), *Prentice* obtained a rule calling upon the plaintiff and the Registrar of the County Court of *Kent*, holden at *Rochester*, to shew cause why the registrar should not approve and receive, as of the 1st *November*, the bond tendered to him by the defendants, under stat. 19 & 20 *Vict. c. 108. s. 39.*

It appeared from the affidavits that, on the 23d *October*, 1861, a plaint was entered by the plaintiff in the said County Court against the defendants for the sum of 50*l.*, for damages sustained by the plaintiff through the negligence of the defendants. The defendants objected to the action being tried in the County Court, and, in pursuance of stat. 19 & 20 *Vict. c. 108. s. 39.*, gave the notice required by rule 134 of "The rules and orders for regulating the practice of

1861.
 Re YOUNG
 v.
 BROMPTON &c.
 Waterworks
 Company.

the County Courts, and forms of proceeding therein" (a). On the day appointed by the registrar for the execution of the bond, the attorney for the defendants tendered to the registrar, for his approval, a bond in the form set forth in the "Schedule of Forms to the rules of practice of the County Courts, No. 81" (b), under the common seal of the Company, and executed by the two parties. It was admitted that the sureties were sufficient; but, no specific power in the act of incorporation of the Company enabling the directors to give the bond tendered being shewn, the registrar declined to approve the bond, on the following grounds: 1st, that the Company could not give such a bond; 2ndly, that money might be deposited; and, 3dly, that the defendants had their remedy by certiorari, and consequently were not damified by his refusal.

G. Denman and *F. Russell* shewed cause for the registrar. — One of the courses which a defendant objecting to the action being tried in the County Court may take, in order to remove it, is prescribed by stat. 19 & 20 *Vict. c. 108. s. 39.*, which enacts that, "if in any action of tort the plaintiff shall claim a sum exceeding 5*l.*, . . . and the defendant shall give security, to be approved of by the registrar, for the amount claimed; and the costs of trial in one of the superior Courts of common law, not exceeding in the whole the sum of 150*l.*, all proceedings in the County Court in any such action shall be stayed." By sect. 70, "Where by this Act, or any Act relating to the County Courts, a party is required to give security, such security shall be at the cost of the party giving it, and

(a) See *Pollock's Practice of the County Courts*, 4th ed., App. to Part I., p. 84.

(b) See *Id.* p. 108.

in the form of a bond, with sureties, to the other party."

But this latter section applies only to cases in which the party is capable of executing a bond. Another course is open to the defendants under sect. 71, which enacts, that "where by this Act, or any Acts relating to the County Courts, a party is required to give security, he may in lieu thereof deposit with the registrar" "a sum equal in amount to the sum for which he would be required to give security." The defendants in this case could not give a valid bond, and therefore the proper course for removing the cause was by depositing a sum, under sect. 71. A form of bond is given in the "Schedule of Forms to the Rules of Practice of the County Courts, No. 31." But the statute does not contemplate a bond being executed by defendants who are not at liberty to bind themselves. It would not be fair on the sureties to take such a bond, and the registrar would be liable to the plaintiff if he took a bond not according to the statute. [*Blackburn J.* If the taking of the bond was bonâ fide he would incur no liability.] A corporation can only execute a bond when it is within the scope of their general authority. [They cited *Hill v. The Manchester and Salford Waterworks Company (a)*.] [*Blackburn J.* In that case the bond was given for money borrowed. Why does the fact of the party being a corporation prevent them from executing this bond? A certiorari to remove an indictment against a corporation is granted upon the corporation entering into a bond under its corporate seal. The words in sect. 70, "the party giving it," viz. the bond, mean the party to the action. *Cockburn C. J.* This bond is necessary for the defence of the corporation, assuming the case is a

1861.

Re YOUNG
v.
BROMPTON &c.
Waterworks
Company.

(a) 5 B. & Ad. 866.

1861.
 Re Young
 v.
 BROMPTON & C.
 Waterworks
 Company.

proper one to be tried in a superior Court. If the party, being a pauper or insolvent, proposes to give a bond with sufficient sureties, the registrar would be bound to receive it, only he would inquire more vigilantly into the sufficiency of the sureties. *Wightman J.* Otherwise a pauper could not remove a cause from the County Court. Suppose an action against a minor, who would not be liable on the bond, still sect. 70 says that "the party" shall give a bond. *Cockburn C. J.* If a defendant is incompetent to execute a bond, would not a bond executed by the sureties, the principal not being a party to it, be sufficient? *Blackburn J.* Corporations are deprived of the benefit of being examined upon interrogatories by an oversight in stat. 1 *Will. 4. c. 22.*, because a corporation cannot take an oath; but there is nothing in stat. 19 & 20 *Vict. c. 108.* to exclude corporations from the benefit of that Act.]

C. G. Addison appeared for the plaintiff, but did not argue.

Prentice was not heard in support of the rule.

COCKBURN C. J. Under stat. 19 & 20 *Vict. c. 108.* the registrar has only to see that a bond is executed by the party to the action with sufficient sureties. Further, I think that the execution of this bond was within the scope of the general power of the corporation.

WIGHTMAN and BLACKBURN JJ. concurred.

Rule absolute.

1861.

The QUEEN *against* The Burial Board for the
Parishes of ST. JOHN, WESTGATE, and ELSWICK,
in the Borough and County of NEWCASTLE
UPON TYNE.

Wednesday,
November 20th.

18 & 19 Vict.
c. 128. s. 18.
*Closed burial
ground.
Repair.*

Stat. 18 & 19 Vict. c. 128. s. 18., which enacts that, in every case in which any order in council is issued for the discontinuance of burials in any churchyard or burial ground, the Burial Board or Churchwardens shall maintain such churchyard or burial ground of any parish in decent order, and also do the necessary repair of the walls and other fences thereof, and the expences shall be repaid by the overseers, upon the certificate of the Burial Board or Churchwardens, out of the poor rate of the parish or place in which such churchyard or burial ground is situate, unless there shall be some other fund legally chargeable with such expences, does not apply to a burial ground which is not a burial ground of any parish, but is the property of private persons.

MANDAMUS to the Burial Board for the parishes of *St. John, Westgate, and Elswick*, in the borough and county of *Newcastle upon Tyne*. The writ recited that, on the 18th *February*, in the year of our Lord 1854, being after the passing of stat. 16 & 17 Vict. c. 134., entitled "An Act to amend the laws concerning the burial of the dead in *England* beyond the limits of the metropolis, and to amend the Act concerning the burial of the dead in the metropolis," it appeared to Her Majesty in council, upon the representation of one of the principal Secretaries of State, that, for the protection of the public health, burials in a certain burial ground called *St. Paul's Churchyard*, situate and being in the township of *Westgate*, in the borough and county of *Newcastle upon Tyne*, should be wholly discontinued, and Her Majesty thereupon did, by the advice of her privy council, in due form of law order that, after :

1861.

The QUEEN
v.
Burial Board of
ST. JOHN,
WESTGATE.

time mentioned in the said order, and long since elapsed, that is to say the 1st *May*, 1854, burials in the said burial ground should be wholly discontinued. That all things had been done and happened which were necessary to be done and to happen in order to authorize and empower Her Majesty to make the same order, and to oblige all persons whom it might concern in that behalf to discontinue to bury in the said burial ground after the 1st *May* 1854, and to make the same order binding and effectual to all intents and purposes. That the township of *Westgate* and the township of *Elswick* respectively were places having separate overseers and maintaining their own poor and were townships for which and for the parish of *St. John*, such joint Burial Board as aforesaid had been formed by the name of the Burial Board for the parishes of *St. John*, *Westgate*, and *Elswick*, in the borough and county of *Newcastle upon Tyne*; and the said township of *Westgate* is the township and place described in the name by which the said Burial Board is so incorporated as the parish of *Westgate*. That the said burial ground at the time of the making of the order and always was a burial ground to which, according to the true intent and meaning of the said Act of Parliament, the order extended; and that the said burial ground was not a burial ground of Quakers or Jews within sect. 2. That such burial ground was the property of certain private persons, and the same was expressly mentioned in such order. That the said burial ground was not a cemetery within sect. 5. That, since the making of the order, burials in the said burial ground had been discontinued in obedience to the order. That, at the

time of the making of the order, there were, and thence continually hitherto had been, and still were, certain walls and other fences of and belonging to the burial ground. That the burial ground was not, and for a long time had not been, in decent order. That the walls and fences of the burial ground were, and for a long time had been, out of repair, and did require, and for a long time had required, certain necessary repair. That there were not, and never had been, any churchwardens or churchwarden chargeable under the said Act or otherwise, or liable or compellable under the said Act or otherwise, to maintain such burial ground in decent order, or to do the necessary repair to the walls and other fences thereof: and that there was no person legally chargeable with the costs and expences of maintaining the said burial ground in decent order, and of the necessary repair of the walls and other fences thereof, except in so far as the rates made or to be made for the relief of the poor of the township of *Westgate*, in which the said burial ground is situate, were by the said Act constituted and made such fund. And that the defendants, having notice and knowledge of the premises, had, after the passing of the said Act, and after the making of the said order, neglected and refused, and still did neglect and refuse, to maintain such burial ground in decent order, and to do the necessary repair of the walls and fences thereof, although they had been often requested so to do, in violation of the said Act and of their duty. The writ commanded the defendants to maintain the said burial ground in decent order, and do the necessary repairs of the walls and other fences thereof.

1861.

The QUEEN
v.
Burial Board of
St. JOHN,
WESTGATE.

1861.

The QUEEN
v.
Burial Board of
St. John,
Westgate.

Return.—That the burial ground in the writ of mandamus mentioned was not a churchyard or burial ground of any parish or of any place having separate overseers and maintaining its own poor, but was the property of certain private persons. And that, in the year 1854, the vestry of the parish of *St. John*, at a meeting properly convened, resolved that a burial ground should be provided for the parish under the Acts of Parliament in such case made and provided, and duly appointed a Burial Board for the parish, and all things happened and were done necessary to constitute the said Burial Board a Burial Board for the parish; and from thenceforth continually the Burial Board for the parish of *St. John* had been and was a body corporate. And that, in the said year 1854, the vestry of the township of *Westgate*, at a meeting properly convened under the said Acts, resolved that a burial ground should be provided for the said township under the said Acts of Parliament, and duly appointed a Burial Board for the said township, and all things happened and were done necessary to constitute the said last mentioned Burial Board a Burial Board for the said township; and from thenceforth continually the Burial Board for the township of *Westgate* had been and was a body corporate, and had been and was the Burial Board for the said township, and the Burial Board of the place in which the said burial ground is situated. And that, in the said year 1854, the vestry of the township of *Elswick*, at a meeting properly convened under the said Acts, resolved that a burial ground should be provided for the township of *Elswick* under the said Acts of Parliament, and duly appointed a Burial Board for the said

township, and all things happened and were done necessary to constitute the said last mentioned Board a Burial Board for the said township; and from thenceforth continually the Burial Board for the said township of *Elswick* had been and was a body corporate. And that, after the vestries of the said parish and the said two townships had respectively so resolved as aforesaid, and the said three Burial Boards had been so constituted as aforesaid, the vestries of the said parish and two townships concurred in providing one burial ground for the common use of such parish and townships in accordance with the provisions of the said Acts, and the Burial Boards for the same parish and two townships became and were entitled, subject to the terms agreed upon by the said vestries, to act as one joint Burial Board for the said parish and two townships, for the purpose of providing and managing such one burial ground, and taking and holding lands for the same; and thereupon the defendants, being the said joint Board, became and were, for such purposes only as last aforesaid, a body corporate by the said name of "The Burial Board for the parishes of *St. John, Westgate* and *Elswick*, in the borough and county of *Newcastle upon Tyne*."

Demurrer and joinder therein.

T. Jones (of the Northern Circuit), for the prosecutors—First, the walls of this burial ground, which has been closed by order in council, are to be kept in repair at the public expence. That involves the question whether there was authority to close it under stat. 16 & 17 *Vict. c. 134. ss. 1 and 2.* [*Mellish*, contra, admitted that it had been properly closed, and that the last proviso in sect. 2

1861.

The QUEEN
v.
Burial Board of
St. JOHN,
WESTGATE.

1861.
 The QUEEN
 v.
 Burial Board of
 St. JOHN,
 WESTGATE.

was not applicable.] By sect. 18 of stat. 18 & 19 *Vict.* c. 128., "In every case in which any order in council has been or shall hereafter be issued for the discontinuance of burials in any churchyard or burial ground, the Burial Board or Churchwardens, as the case may be, shall maintain such churchyard or burial ground of any parish in decent order, and also do the necessary repair of the walls and other fences thereof, and the costs and expences shall be repaid by the overseers, upon the certificate of the Burial Board or Churchwardens, as the case may be, out of the rate made for the relief of the poor of the parish or place in which such churchyard or burial ground is situate, unless there shall be some other fund legally chargeable with such costs and expences." The only words which create any difficulty are "such churchyard or burial ground of any parish;" but the generality of the preceding words, "in every case" and "in any church yard or burial ground," shew that the obligation imposed by sect. 18 was intended to be correlative with the order in council for closing. And the concluding part of the section directs that the expences of the repairs shall be repaid out of the poor rate of the parish "in which such churchyard or burial ground is situate." [*Blackburn J.* The section does not say that the expence shall be repaid out of that fund, if the burial ground is not the burial ground of the parish.] The Court will not be guided entirely by the use of one preposition instead of another in a particular clause, but will look to the whole section, and to enactments in other statutes in *pari materiâ* which throw light upon it. [*Cockburn C. J.* The burial ground of a parish is very different from a burial ground in a parish.] The words "unless there shall be some other fund legally chargeable with

such costs and expences" plainly refer to some other burial grounds than burial grounds of a parish. [*Cockburn* C. J. The legislature may have contemplated a parish burial ground having some fund appropriated to its repair.] By sect. 21 of stat. 24 & 25 *Vict. c. 61.*, for amending The Local Government Act, 1858, "All local Boards of Health constituted Burial Boards may from time to time repair and uphold the fences surrounding any burial ground which shall have been discontinued as such within their jurisdiction:" this indicates the policy of the legislature to be that all burial grounds shall be kept in decent order by some person. [*Wightman* J. In that enactment the legislature seem to have thought it necessary to make some provision for the repair of the fences of burial grounds not being parish burial grounds. *Blackburn* J. Who was liable to maintain the fence of this burial ground before it was closed?] There was no liability on anybody. [He then contended, secondly, that the liability was upon this joint Burial Board, and referred to sections 10, 23 and 24 of stat. 15 & 16 *Vict. c. 85.*, extended to parishes not in the metropolis by sect. 7 of stat. 16 & 17 *Vict. c. 134.* and sect. 2 of stat. 20 & 21 *Vict. c. 81.*; but the judgment of the Court renders it unnecessary to report the argument on this question.]

1861.

The QUEEN
v.
Burial Board of
ST. JOHN,
WESTGATE.

Mellish, for the defendants —Sect. 18 of stat. 18 & 19 *Vict. c. 128.* only applies to the burial ground of a parish properly so called. By the interpretation clause (sect. 52) of stat. 15 & 16 *Vict. c. 85.*, which is extended to parishes not in the metropolis by sect. 7 of stat. 16 & 17 *Vict. c. 134.*, the word "' parish' shall mean every place having separate overseers of the poor, and separately maintaining

1861.
 The QUEEN
 v.
 Burial Board of
 St. JOHN,
 WESTGATE.

its own poor." The construction contended for by the prosecutors requires that the words "of any parish," in the first part of sect. 18 of stat. 18 & 19 *Vict. c. 128.*, should be struck out: for according to that construction the words "in any parish," would be unmeaning or useless. Sect. 8 of stat. 20 & 21 *Vict. c. 81.* intended to give a remedy for this case: it enables the vestry of any parish, in which any burial ground closed by order in council is situate to purchase it, and declares that it shall then be subject to all the conditions affecting the burial grounds of the parish in which it is situate: so that the Burial Board would then be liable to maintain the fence. Sect. 2 of stat. 16 & 17 *Vict. c. 134.* makes a distinction between parochial and non-parochial burial grounds: it enacts that no order in council for closing a burial ground "shall be deemed to extend to any non-parochial burial ground being the property of any private person, unless the same be expressly mentioned in such order." [He also referred to sect. 5.] A public burial ground, though closed, still remains a "public" burial ground: and so of a private burial ground. (He was then stopped.)

COCKBURN C. J. The mandamus is bad on the first ground. The words of sect. 18 of stat. 18 & 19 *Vict. c. 128.* are too strong to be got over, whatever may have been the intention of the legislature, on which I do not hazard any speculation. The operative words of sect. 18 are, "the Burial Board or Churchwardens, as the case may be, shall maintain such churchyard or burial ground of any parish in decent order." In order to adopt any other construction than that the burial ground to be so maintained in decent order must be the burial

ground of the parish, we must strike out the words "of any parish," which we cannot do. Also the plain distinction taken throughout these Acts which are in *pari materia* between the burial ground of the parish and other burial grounds, is a strong confirmation of our construction.

1861.

The QUEEN
v.
Burial Board of
St. John,
Westgate.

WIGHTMAN J. I had some doubt whether the legislature did not intend that all burial grounds situated in the parish should be kept in decent order; and nobody would be liable, unless the Burial Board or Churchwardens were required, so to keep them. The difficulty is, that sect. 18 says that the Burial Board shall maintain the "burial ground of any parish" in decent order. It is argued, on the other side, that the section directs that the expences of so doing shall be repaid out of the poor rate of the parish "in which such burial ground is situate." That raises a doubt as to the construction of the former part of the section; but a reference to the clauses in the other statutes in *pari materia*, shew that the operative words of sect. 18 of this statute are limited to the burial ground of the parish, properly so called. The parish may purchase this burial ground, if they wish it to be kept in decent order.

BLACKBURN J. I am of the same opinion, on the ground that, by sect. 18 of stat. 18 & 19 *Vict. c. 128.*, the obligation to repair the walls and fences of a burial ground is confined to the case of a burial ground of the parish in the sense for which the defendants contend.

Judgment for the defendants.

1861.

*Saturday,
November 9th.*

9 G. 4. c. 31.
ss. 27—29.
*Certificate of
justices.*

The QUEEN, on the prosecution of E. H. FINNEY, against R. J. ELRINGTON and H. H. ELRINGTON.

Where, under 9 G. 4. c. 31. ss. 27—29., a complaint of assault or battery has been made to two justices of the peace, who dismiss the complaint and give the party a certificate accordingly, the certificate may be pleaded in bar to an indictment, founded on the same facts, charging assault and battery, accompanied by malicious cutting and wounding so as to cause grievous or actual bodily harm.

THIS was an indictment, preferred 25th *November*, 1860, containing three counts, the first of which was as follows :

“The jurors for our lady the Queen upon their oaths present that *Richard John Elrington*, late of the parish of *Heston*, in the county of *Middlesex*, labourer, and *Henry Handley Elrington*, late of the parish of *Heston*, in the county of *Middlesex*, labourer, on the 5th *September*, 1860, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one *Edward Hamilton Finney*, in the peace of God and our lady the Queen then and there being, did make an assault, and him the said *E. H. F.* then did beat, wound and illtreat, and that the said *R. J. E.* and the said *H. H. E.*, with certain large walking sticks which they the said *R. J. E.* and the said *H. H. E.* in their right hands then and there had and held, unlawfully, maliciously and violently did cut and wound him the said *E. H. F.* in and upon the head, face, shoulders and arms, thereby causing to the said *E. H. F.* grievous bodily harm, against the form of the statute in such

case made and provided, and against the peace of our lady the Queen, her crown and dignity."

1861.

The QUEEN
v.
ELDRINGTON.

The second count was similar to the first, except that it alleged "actual bodily harm" instead of "grievous bodily harm."

The third count was for a common assault and battery.

To the first count the defendant *Richard John Elrington* pleaded this plea.

"And now, that is to say on the 2d November in this same Term, before our said lady the Queen at *Westminster*, cometh the said *Richard John Elrington*, by *Thomas Henry Strangways* his attorney, and, having heard the said indictment read, he saith that, as to the first count of the said indictment, our said lady the Queen ought not further to prosecute the said indictment against the said *R. J. E.* in respect of the offence in the said first count of the said indictment mentioned; because he saith that heretofore, to wit on the 22d September, 1860, at the Town Hall, *Brentford*, in the said county of *Middlesex*, the said *R. J. E.* was, upon a certain information and complaint of the said *E. H. F.* in the indictment mentioned, he being the party aggrieved in that behalf, brought before *Benjamin John Armstrong* and *George Cooper*, Esquires, two of Her Majesty's justices of the peace in and for the said county of *Middlesex*, charged by the said information and complaint with having, within three calendar months then last past, at *Heston*, in the said county, unlawfully and violently assaulted the said *E. H. F.* on the 5th September in the year aforesaid, contrary to the statute in that case made and provided. And the said justices then and there had jurisdiction to hear and determine

1861.
 The QUEEN
 v.
 ELRLINGTON.

the said complaint, and did then and there, to wit, at *Brentford* aforesaid, on the 22d *September* aforesaid, duly proceed to hear such complaint, and upon such hearing they then and there deemed the offence so complained of by the said *E. H. F.* not to be proved, and thereupon they dismissed the said complaint, and forthwith made out a certificate under their hands, and delivered it to the said *R. J. E.*, which said certificate is now shewn to the Court here, and is in the words following, that is:

‘*Middlesex*, to wit.] Be it remembered that, on the 6th day of *September*, in the year of our Lord 1860, information was laid before *George Cooper*, Esquire, one of Her Majesty’s justices of the peace in and for the said county of *Middlesex*, For that *Richard John Elrlington* did, on the 5th day of *September* instant, at the parish of *Heston*, in the said county of *Middlesex*, unlawfully and violently assault *Edward Hamilton Finney* the elder, contrary to the statute, &c. And now at this day, to wit, on the 22d day of *September*, in the year aforesaid, at the Town Hall, *New Brentford*, in the said county, both the said parties appear before us in order that we should hear and determine the said information, whereupon, the matter of the said information being by us duly considered, it manifestly appears to us that the said information is not proved, and we do therefore dismiss the same.

‘Given under our hands and seals this 22d day of *September*, in the year of our Lord 1860, at the Town Hall, *New Brentford*, in the county aforesaid.

‘*Benjn. J. Armstrong* (L. s.)

‘*Geo. Cooper* (L. s.)’ .

Which said judgment and dismissal still remain in full force and effect, and not in the least reversed or made

void. And the said *R. J. E.* further saith that the violently assaulting the said *E. H. F.* so complained of against him the said *R. J. E.*, and which complaint the said justices so deemed not to be proved, and which they so dismissed as aforesaid, and the assaulting, beating, wounding and illtreating, and the cutting and wounding the said *E. H. F.* in the said first count of the said indictment mentioned, are one and the same assault and not other and different, and are in respect of one and the same cause, and not other and different, and this he, the said *R. J. E.* is ready to verify: wherefore he prays judgment if our said lady the Queen ought further to prosecute the said indictment against him, the said *R. J. E.*, in respect of the said offence in the said first count of the said indictment mentioned, and that he, the said *R. J. E.*, may be dismissed and discharged from the same."

1861.

The QUEEN
v.
ELBRINGTON.

There were similar pleas to the other counts, and similar pleas by the other defendant to all the counts.

Demurrers and joinders in demurrer.

Ribton (*A. Collins* with him), in support of the demurrers.—The pleas are framed on the 9 *G. 4. c. 31.* sect. 27—29.

Sect. 27. "Whereas it is expedient that a summary power of punishing persons for common assaults and batteries should be provided under the limitations hereinafter mentioned,' Be it therefore enacted that, where any person shall unlawfully assault or beat any other person, it shall be lawful for two justices of the peace, upon complaint of the party aggrieved, to hear and determine such offence, and the offender, upon conviction thereof before them, shall forfeit and pay such fine as shall appear to them to be

1861. meet, not exceeding, together with costs (if ordered)
The QUEEN the sum of 5*l*., which fine shall be paid to some one of
V. the overseers of the poor, or to some other officer of the
ELBRINGTON. parish, township, or place in which the offence shall have
been committed, to be by such overseer or officer paid
over to the use of the general rate of the county, riding,
or division in which such parish, township, or place shall
be situate; whether the same shall or shall not contribute
to such general rate, &c. ; and if such fine as shall be
awarded by the said justices, together with the costs (if
ordered), shall not be paid, either immediately after the
conviction, or within such period as the said justices
shall at the time of the conviction appoint, it shall be
lawful for them to commit the offender to the common
gaol or house of correction, there to be imprisoned for
any term not exceeding two calendar months, unless
such fine and costs be sooner paid ; but if the justices,
upon the hearing of any such case of assault or battery,
shall deem the offence not to be proved, or shall find
the assault or battery to have been justified, or so trifling
as not to merit any punishment, and shall accordingly
dismiss the complaint, they shall forthwith make out a
certificate under their hands, stating the fact of such
dismissal, and shall deliver such certificate to the party
against whom the complaint was preferred."

Sect. 28. "If any person against whom any such
complaint shall have been preferred for any common
assault or battery, shall have obtained such certificate
as aforesaid, or having been convicted shall have paid
the whole amount adjudged to be paid under such con-
viction, or shall have suffered the imprisonment awarded
for non-payment thereof, in every such case he shall be
released from all further or other proceedings, civil or
criminal, for the same cause."

Sect. 29. " Provided always, and be it enacted, that in case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstance, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as they would have done before the passing of this Act: Provided also, that nothing herein contained shall authorize any justices of the peace to hear and determine any case of assault or battery in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any Court of justice."

1861.

The QUEEN
V.
ELBRINGTON.

It must be conceded that this kind of plea is an answer to the third count of the indictment; but it is not to the first or second. The jurisdiction given to the justices by these enactments extends only to ordinary cases of assault and battery, and is inapplicable to cases of aggravated assault, such as are alleged in those counts, which charge the defendants with malicious cutting and wounding, so as to cause "grievous bodily harm," and "actual bodily harm." In *Re Thompson (a) Pollock* C. B. says: "In my judgment, an assault with intent to commit a rape is as distinct an offence from a common assault as murder is distinct from rape. They are both distinct from an ordinary assault, or an assault for a purpose not amounting to felony, but yet going beyond a common assault, and the circumstance of there being an assault (as a common circumstance in all these cases) does not

(a) 9 W. R. 203.

1861.

The QUEEN
v.
ELBRINGTON.

identify the two crimes so as to make them more or less of the same class of offence. This is an assault, with something beyond ; but still, having taken that away from the assault, in my judgment there is as much distinction in point of law between a common assault and an assault with intent to commit a rape, as there is between larceny and perjury ; and I do not think that it was ever intended that they should be confounded together." That applies *à fortiori* to this case ; for here the facts are the same, so that the only question was the correctness of the inference of intent. [*Cockburn* C. J. In that case the Court of Exchequer was equally divided in opinion as to the jurisdiction of the magistrates to convict under the circumstances. A habeas corpus had been previously moved for in this Court, when we unanimously held that the conviction was good (a). *Blackburn* J. Are you prepared to distinguish this case from *Regina v. Walker* (b), where it was held that a plea of *autrefois* convict before justices, under this statute, was a bar to an indictment for felonious stabbing ?] That case was only the decision of a single Judge ; besides which it turned on the effect of a plea of *autrefois* convict ; here the plea is *autrefois* acquit. [*Blackburn* J. What difference can that make ? Both cases are under the same enactment. *Cockburn* C. J. Suppose a man indicted and tried before a jury for a common assault were acquitted, if the prosecutor were afterwards to indict him for a felonious assault on the same facts, could he not plead *autrefois* acquit ? In the case just cited, p. 457, *Coltman* J., a most careful and learned Judge, says he could.] The prosecutor who prefers a bill of indict-

(a) See 6 *Jur. N. S.* 1247.

(b) 2 *Moo. & Rob.* 446.

ment shapes his charge as he pleases, whereas a complaint before justices is drawn up by their clerk, who may draw it up in a wrong form. [*Cockburn C. J.* In *Regina v. Stanton (a)*, which was an indictment for a felonious assault and wounding, it having transpired in the course of the trial that the prisoner had been previously convicted before two justices for the same assault, *Erle J.* said: "In my opinion the conviction would have been an estoppel to the indictment for the felonious assault and wounding, if pleaded, and although it has not been pleaded I am bound to consider the charge as having been already adjudicated upon, and the prisoner as having undergone the punishment allotted for it."] That is only an obiter dictum. The case was not argued before the Judge, and all the facts were not before him. Great public inconvenience would result from holding this plea good: suppose a party charged before justices of the peace with an assault with intent to commit rape; the justices, acted upon by some influence, might deal with the case under the statute as a common assault, and thus assume a jurisdiction the statute never intended to give them. [*Blackburn J.* If the justices did that maliciously, they would be indictable.] In order to ascertain the nature of the complaint brought before the justices, this Court must look at the charge, and the evidence by which it was supported.

B. C. Robinson and *Poland*, for the defendants respectively, were not called on.

COCKBURN C. J. The defendants are entitled to our judgment. We cannot deal with hypothetical cases

(a) 5 Cox Cr. Cas. 324.

1861.

THE QUEEN
V.
ELBRINGTON.

1861.

The QUEEN
v.
ELBRINGTON.

when we are considering what is the law with reference to pleas which have been demurred to. On the facts, as stated here, a complaint for a common assault was preferred before two justices of the peace, who adjudicated upon it. In respect to the very same assault this indictment is now preferred, and to that these pleas are pleaded. The statute is express, and says that, where a complaint for a common assault is made before two justices of the peace, they may either convict the party accused or dismiss the charge, and give him a certificate which shall be a bar to further proceedings. Here they have given such a certificate: and now an indictment is preferred against the same party, charging him, not merely with a common assault, but with two assaults of an aggravated character, arising out of the same transaction. In the cases referred to, of *Regina v. Walker (a)* and *Regina v. Stanton (b)*, it was held that this statute intended in all cases to make the certificate of the justices a bar to all further proceedings or charges arising out of the same matter. Those decisions are perfectly right. It may be that in some extraordinary cases, of occasional occurrence, the inconvenience pointed out by Mr. *Ribton* may arise, but in the ordinary administration of the law we must not suppose such an outrageous thing as that justices of the peace would act in the manner he has suggested; and, on the other hand, we must bear in mind the well established principle of our criminal law that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form. The words of the statute are express, and the present case is brought within

(a) 2 Moo. & R. 446.

(b) 5 Cox Cr. Cas. 324.

it by the pleadings. The defendant, therefore, having received this certificate from the justices before whom the case was heard, may now plead it in bar to this indictment.

1861.

THE QUEEN
V.
ELBRINGTON.

BLACKBURN J. (the only other Judge present.) The statute gives the justices jurisdiction on complaint of the party aggrieved: and, in order to give them that jurisdiction, complaint must be made by him of assault or battery. But Mr. *Ribton* suggests that, by some manoeuvring on the part of the justices, they might decide a matter which they had no right to decide, and in respect of which complaint could not be made before them. In such a case, if the parties behaved very ill, no doubt there would be a remedy. But here we must take the facts, as they are admitted by demurrer, to be true, namely that the party did go before two justices of the peace and complain of assault and battery, in which case the statute gives three alternatives to the justices: 1. Conviction. 2. Acquittal; and, if they dismiss the complaint, they are directed to give the party a certificate accordingly. 3. The course pointed out by sect.29. "In case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstance, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as they would have done before the passing of this Act." Now that course the justices have not adopted: and we must therefore take it that they did not think the charge was one fit for indictment, or they would have dismissed it on that ground. That being so, the party complaining

1861.
The QUEEN
 v.
ELDRINGTON.

now prefers an indictment in which he charges the defendants with an assault, coupled with aggravating circumstances, and the plea raises the question whether the certificate of the justices is a bar. On that sect. 28 is express: it says that the party charged "shall be released from all further or other proceedings, civil or criminal, for the same cause." It seems to me that an assault and battery, aggravated by wounding, is the same cause as that which was heard before the justices. *Regina v. Walker* (a) is a distinct authority; and I think that case was rightly decided. It was, indeed, a case of felony, and, by the law as it stood at that time, the defendant might have been acquitted of the felony for which he was indicted, and convicted of a common assault (b). How far the change of the law makes a difference in that respect I will not say; but that case is quite applicable here, and was decided quite rightly on the construction of the statute.

It would be extremely inconvenient and hard if, when a case had been brought before two justices of the peace and fairly adjudicated, it could be reviewed in the event of any colourable grounds presenting themselves for preferring a charge of wounding. By the law as it stood when the present indictment was preferred, all wounding must have been with an instrument; that is not so now (c), and consequently there are few assaults in which there would not be some pretext for saying there was a wounding. Judgment for the defendants (d).

(a) 2 Moo. & Rob. 446.

(b) i. e., by 7 W. 4 & 1 Vict. c. 85. s. 11.; since repealed by 14 & 15 Vict. c. 100. s. 10.

(c) See 24 & 25 Vict. c. 100. ss. 11. 18. 20.

(d) The 9 G. 4. c. 31. is repealed by 24 & 25 Vict. c. 95., and the three sections on which the above case depended are reenacted, with alterations, by 24 & 25 Vict. c. 100. ss. 42. 44. 45. 46.

1861.

WILLIAMS, appellant, *against* The Churchwardens
and Overseers of the parish of LLANGEINWEN,
respondents.

Saturday,
November 9th.

Poor rate.
6 & 7 W. 4
c. 96.
Tithe Com-
munication rent
charge.
Curate's
salary.
Tenant's
property tax.

1. Where a beneficed clergyman is compellable by his Bishop to appoint a curate, or under a sense of religious, independent of legal obligation, appoints one, in either case he is entitled, in assessing his tithe commutation rent charge to the poor rate under 6 & 7 W. 4. c. 96., to deduct the salary of the curate from the amount of the rent charge.

2. Two districts adjoined each other, and from time immemorial a single rector had been presented, admitted and instituted to them jointly; and it had been the uniform custom to have a single performance of divine service in each every *Sunday*. The incumbent of the parish voluntarily, but in consequence of a wish expressed by the Bishop to the clergy generally that there should be two performances of Divine service in the churches of the diocese, introduced the practice of having a morning and evening performance of Divine service at each of the churches, and employed a curate to assist him in the performance of them: held, that the incumbent was entitled to a deduction of the curate's salary from the amount for which he was liable to be rated to the poor rate under 6 & 7 W. 4. c. 96.

3. Concessum, that the incumbent was entitled to a deduction from it for the amount of tenant's property tax, under 16 & 17 Vict. c. 34.

ON an appeal to the Quarter Sessions of *Anglesey* against an assessment to the poor rate for the parish of *Llangeinwen* in that county, the following case was, by the consent of the parties, and by Judge's order, under 12 & 13 Vict. c. 45., stated for the opinion of this Court:—

In the year 1829, the appellant was presented by the Earl of *Pembroke*, the patron, to the benefice, with the cure of souls, of *Llangeinwen* and *Llangaffo*, in the said county.

Llangeinwen and *Llangaffo* adjoin each other; each has a definite boundary line, and its own distinct church;

1861.

WILLIAMS
v.
Overseers of
LLANGEIN-
WEN.

each separately maintains its own poor, having its separate churchwardens and overseers of the poor, and distinct vestry, and separate church rate, poor rate and tithe apportionment. They are situate in rural districts, and together comprise an area of about 6079 acres. The population of *Llangeinwen* at the last parliamentary census was 943, and that of *Llangaffo* 139. The churches are about two miles distant from one another. There is no parsonage house, but a house appointed by the Bishop in his license, which is situate in *Llangeinwen*, and is two miles from the church of *Llangeinwen*, and four miles and a half from the church of *Llangaffo*. A district of *Llangeinwen*, called *Rhaudir*, runs up to within about 200 yards of the chapel of *Llangaffo*. The inhabitants of such district bury their dead in *Llangaffo* chapel-yard, and those who are church-going people among them attend the church services at *Llangaffo*. By an agreement made on the 15th September, 1839, between the owners of land within the parish of *Llangeinwen* of the one part, and the appellant, rector of the said parish, of the other part, the tithes of that parish are commuted at 540*l*, which sum it is stated in the said agreement shall be paid to the said *William Wynne Williams* as rector of the said parish, and to his successors, in lieu of the tithes, &c., of the said parish; and by a like agreement, made on the 10th September, 1839, in the same language, mutatis mutandis, the tithes of the parish of *Llangaffo* are commuted at 205*l*.

From time immemorial a single rector has been presented, admitted and instituted to and in *Llangeinwen* and *Llangaffo* jointly. No instance is known of their having been held by different parsons, and they are reputed to be annexed to one another as one benefice.

The institution has always been in the following form :—

“I admit you to the rectory and parish church of *Llangeinwen*, otherwise *Llan Keynwen et Llangaffo*, in the county of *Anglesey* and diocese of *Bangor*, vacant &c., to which you stand presented by the Right Honorable *R. Henry*, Earl of *Pembroke*, the patron thereof; and I do hereby duly and canonically admit and institute you in and to the said rectory of *Llangeinwen*, otherwise *Llan Keynwen et Llangaffo*, and do invest you with all and singular the rights, &c., thereunto belonging, you having first subscribed the articles, and taken the oath, and made and subscribed the declarations &c.; and I do by these presents commit unto you the care of the souls of the parishioners of the said parishes, and the government of the churches aforesaid, and do authorize you to preach the Word of God in the parish churches aforesaid.”

1861.

WILLIAMS
V.
Overseers of
LLANGEIN-
WEN.

In the ancient ecclesiastical terrier of the diocese in which *Llangeinwen* and *Llangaffo* are situated, they are referred to as follows:—“A true and perfect terrier of all tithes, pensions and profits which belong to the rectory of *Llangeinwen*, together with its chapel and chapelry of *Llangaffo*.” They are also similarly described in *Bacon's Liber Regis*.

From time immemorial down to the appointment of the curate hereinafter mentioned, it had been the uniform custom to have a single performance of Divine service only in each of the said churches every *Sunday*. At the time of the commencement of the performance of the double service in the said churches, hereinafter mentioned, there had not, nor has there up to the present time, been any increase in the population of

1861.

WILLIAMS
v.
Overseers of
LLANGEIN-
WEN.

Llangaffo, though there has been a considerable increase in that of *Llangeinwen*. About ten years ago a *Sunday* school was established in *Llangeinwen*, and one in *Llangaffo*.

In the year 18—, the appellant, being then incumbent of the said benefice, voluntarily, but in consequence of a wish expressed by the Bishop of the diocese to the clergy generally that there should be two performances of Divine service in the churches of the diocese, introduced the practice of having a morning and evening performance of Divine service in each of the said churches at 11 o'clock in the morning and 3 o'clock in the afternoon on *Sundays*, which practice has prevailed up to the present time; at the same time the appellant employed, and has continued up to the present time to employ, a curate, at a stipend of 80*l.* per annum, to assist him in the performance of the said services. The curate is licensed by the Bishop, at the yearly stipend of 80*l.*, "to perform the office of stipendiary curate in the parish church of *Llangeinwen*, with the chapelry of *Llangaffo*."

The appellant devotes the whole of his time and attention to his cure of souls, performs two full services on every *Sunday* at the said churches, and assists at the *Sunday* schools. The curate does the like duties every *Sunday*. There is no other necessity for the assistance of a curate in the said parishes than that herein appearing.

The appellant pays the landlord's property tax, under Schedule A. of the statute 16 & 17 *Vict. c. 34.*; but no tenant's property tax, under Schedule B. of that statute, is paid in respect of the tithe rent charge.

In and by an assessment to a poor rate for the parish of *Llangeinwen*, granted on the 14th *April*, 1859, the appellant is assessed as follows :—

First rate made the 14th day of *April*, 1859.

1861.

WILLIAMS
v.
Overseers of
LLANGAIN-
WEN.

Name of Occupier.	Name of Owner.	Description of Property.	Situation of do.	Estimated Extent.	Gross Estimated Rental.	Rate at 6d. in the pound.
1 <i>Rev. W. W. Williams.</i>	<i>Rev. W. W. Williams.</i>	Tithe.	<i>Llangeinwen.</i>		470. 376	9 8 0
2 <i>Do.</i>	<i>Do.</i>	Land and buildings.	<i>Meningron.</i>	31 a. 2 r.	77. 61. 13	1 10 10
						£10 18 10

In making this assessment of the rateable value no deduction was allowed from the amount of the tithe rent charge for the said curate's salary, or any portion thereof, nor for property tax.

The appellant appeals against the said assessment as excessive and illegal, and claims to have it reduced upon the following grounds :—

1st. That a deduction ought to have been allowed from the gross amount of the said rent charge of a proportionate part of the said curate's salary; and it is agreed that, if the appellant is entitled to deduct any amount from the said rent charge in respect of the said curate's salary, the sum of 58*l.* 7*s.* 6*d.* is the proper amount.

2d. That a deduction ought also to have been allowed for the tenant's property tax, under 16 & 17 *Vict. c.* 34. And it is agreed that if any sum ought to be deducted for property tax, the sum of 5*l.* 19*s.* 6*d.* is the proper amount.

The respondents contend, upon the facts of this case, that neither of such deductions ought to be made.

1861.

WILLIAMS
v.
Overseers of
LLANGEGIN-
WEN.

The question for the opinion of the Court is, whether, for the purpose of ascertaining the rateable value of the said tithe rent charge, the appellant is entitled to have the gross sum received by him reduced by any, and if any by which of the items above set forth.

Watkin Williams, for the respondents.—The 6 & 7 W. 4. c. 96. s. 1. enacts: “No rate for the relief of the poor in *England* and *Wales* shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant’s rates and taxes, and tithe commutation rent charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expences, if any, necessary to maintain them in a state to command such rent.” This matter was much considered in the case of *The Hackney and Lamberhurst Tithe Commutation Rent Charges* (a). That case is a decisive authority in favour of the right of the appellant to a deduction for the tenant’s property tax. But, with respect to the first point, relating to the curate, the following general principles are there laid down by the Court, p. 49: “If Mr. *Goodchild* voluntarily contributes this sum towards the maintenance of a clergyman for the district, and may, if he pleases, withdraw it, however laudable the contribution may be, he can no more claim any allowance in respect of it than he could for any portion of his income which he devotes to charitable purposes.” And, at p. 52: “The truth is that the in-

(a) *E. B. & E. 1.*

cumbent cannot measure by any money standard his personal services, or the fruits of them in the spiritual improvement of his parishioners. The personal labours of the incumbent are not a charge on the tithes, but on his personal conscience; and in a matter of poor rate are simply out of the question." [*Wightman J.* The appellant here does not claim for his personal services.] Passing that by, the Court goes on: "Then does this reasoning dispose also of the claim in respect of the curate's salary? In so far as the curate is merely a substitute for the incumbent we think it does so. Where the clergyman is non-resident, or, being resident, from sickness, infirmity or any less creditable cause does not perform his own duty personally, but employs another person instead, all that has been just now said seems to apply. But the application of a principle must depend on circumstances: and a more difficult question arises where, as in the present case, from the vast size or population of the parish, one man's labour is entirely insufficient for the duties necessarily to be discharged by the incumbent." That was the case of a rector whose parish had become too populous for him to perform all the services; and the Court held that he was entitled to deduct the curate's salary. [*Blackburn J.* It always appeared to me that a link was wanting in the chain of reasoning in that judgment. However, the question does not arise here.] The distinction between that case and the present is that these are separate parishes; they have separate churchwardens and overseers, vestries, church rates, poor rates and tithe apportionments. If the appellant were to give up one of them, he would be compellable to appoint a

1861.

WILLIAMS
v.
Overseers of
LLANGFIN-
WEN.

1861. .
 WILLIAMS
 v.
 Overseers of
 LLANGEIN-
 WEN.

person to act in it. The original intention of tithes was to maintain spiritual services in some particular parish. What constitutes a parish church is stated in *Com. Dig. Eglise*: and the following is in *Savile*, 17, pl. 46: "In the time of *Hen. 3* there were, in the county of *Northampton*, two rectories, scil. the rectory of *Maidwell* and the rectory of *Kelmershe*, of which there were two patrons, and the patron of *Maidwell* in 8 *H. 3* purchased the advowson of the church of *Kelmershe*, ever since which time he had presented solely to the church of *Maidwell* cum capella de *Kelmershe*, as appears by the register of the Bishop of *Lincoln*, ordinary there; and then one — *Lewes* obtained presentment of our lady the Queen by lapse to the church of *Kelmershe*, and exhibited his bill in the Exchequer Chamber against one *Pendreth*, parson of *Maidwell*, who occupied the glebe of *Kelmershe*. And there it was decreed with *Lewes* that, although the patron of *Maidwell* after his purchase had presented solely to *Maidwell*, still *Kelmershe* remained, in right, a church, and the freehold is in suspense, and not in the patron of *Maidwell* as disseisor: for the entry of the patron in time of vacation is not a tort, nor gains any freehold. And this by all the Court." [*Blackburn J.* Here the two districts have had the same rector from time immemorial.]

Beavan, for the appellant, referred to the 1 & 2 *Vict. c. 106. s. 80.*, which enacts: "It shall be lawful for the Bishop, in his discretion, to order that there shall be two full services, each of such services, if the Bishop shall so direct, to include a sermon or lecture, on every *Sunday* throughout the year, or any part thereof, in the church

or chapel of every or any benefice within his diocese, whatever may be the annual value or the population thereof; and also in the church or chapel of every parish or chapelry where a benefice is composed of two or more parishes or chapelries, in which there shall be a church or chapel, if the annual value of the benefice arising from that parish or chapelry shall amount to 150*l.*, and the population of that parish or chapelry shall amount to four hundred persons; &c."

1861.

WILLIAMS
v.
Overseers of
LLANGIN-
WEN.

COCKBURN C. J. This case cannot be distinguished from that of *The Hackney and Lamberhurst Tithe Commutation Rent Charges (a)*, which has been cited. It was there laid down that if the beneficed clergyman may be compelled by the Bishop to appoint a curate, or if, under a proper sense of religious, independent of legal obligation, he appoints one, in either case the salary of the curate ought to be deducted from the tithe rent charge. The distinction is between such cases and those where the clergyman appoints a curate because he is absent from the parish, or from some other personal consideration; in these latter cases he is not entitled to make a deduction. Here it is conceded on all hands that the Bishop could have compelled the appointment of a curate, besides which, considering the limits of these two united parishes, it was impossible that the number of services could be performed by one individual. The present case comes within one or other (perhaps both) of the principles by virtue of which that case is authority for saying that the salary of a curate may be deducted.

(a) *E. B. & E. 1.*

1861.

WILLIAMS
v.
Overseers of
LLANGAIN-
WEN.

WIGHTMAN J. I am entirely of the same opinion. This is the case of a single benefice, although composed of two distinct parishes. It is agreed on both sides that the services were necessary: and, as it was absolutely necessary that there should be two persons to perform those services, the case comes within that which has been cited.

BLACKBURN J. On these facts I take it that the employment of this curate, whether the Bishop could compel the rector to employ one or not, was, at all events, a very proper thing in discharge of his moral and clerical duty. If the matter were *res integra* I should entertain considerable doubt. But in the case of *The Hackney and Lamberhurst Tithe Commutation Rent Charges* (a) this Court, in a considered judgment, decided it, and by that decision I deem myself bound.

On the other point, which was there decided, respecting the property tax, I do not entertain the least doubt.

Judgment for the appellant (b).

(a) *E. B. & E. 1.*

(b) See the next case.

1861.

GEORGE DOMVILLE WHEELER, appellant, against
The Churchwardens and Overseers of BUB-
MINGTON, respondents.

Friday,
November 20th.

Poor rate.
6 s 7 W. 4.
c. 96.

Tithe commu-
tation rent
charge.
Curate's
salary.

The parish of *W.*, before the appropriation of the rectory and the endowment of the vicarage, comprised the hamlets of *Great W.*, *Little W.*, *B.* and *D.* In *Great W.* was the mother church. In the hamlet of *B.* a chapel was built, and it is mentioned as a chapelry to *W.* in the Ecclesiastical Taxation of Pope *Nicholas* the Fourth, A.D. 1291: twenty years later *Merton College, Oxford*, obtained a licence from King *Edward II.* to appropriate the rectory of *W.*, together with the chapel of *B.* Two years later the vicarage of *W.* was endowed, and the vicar was, by the endowment deed, required to cause the chapel of *B.* to be served with a suitable priest. In 1616 *B.* had a parsonage house and glebe lands. The chapel of *B.* was served either by a Fellow of *Merton College*, or by curates appointed by that College, or by the vicar of *W.* or his curate. The chapel having fallen into ruins, it was rebuilt in 1693, and the cure thereof restored to the church of *W.*, and an annual stipend granted to the curate out of the appropriate rectory: this ceased probably when an arrangement was made by *Merton College* that they would give a beneficial lease of the rectorial tithes of the glebe of *B.* to their senior resident Fellow on condition of his providing for the cure of *B.* In 1834, *Merton College* resolved that the lease of the great tithes of *B.* should be granted to the vicar of *W.* in augmentation of his benefice. In the records of the diocese, A.D. 1692, *B.* is termed "the parochial chapelry of *B.*," but in all other entries in the registry it is styled a chapel to *W.*; except that in the registry of the Consistory Court of *Worcester* of 1714 there is a terrier of the tithes and glebes belonging to the parish of *B.*; and in the Bishop's register there is a register of baptisms, marriages and funerals in the parish of *B.* from 1711 to 1728. For about a century previous to 1847, the cure of *B.* was provided for by the consecutive lessees of the appropriate rectory, and not by the vicar of *W.* The appellant was instituted to the vicarage of *W.* in 1843, and in 1847 received a lease of the glebe of *B.* and rent charge in lieu of rectorial tithes, for twenty-one years, if he should so long continue the resident vicar of *W.*, he covenanting to serve the cure of *B.* either by himself or by a curate, and to discharge the College of the cure, and to pay all rates and assessments payable out of the rectory. A curate, whose stipend was paid by the appellant, performed the parochial duties and services at *B.*: it was impossible for one person devoting his whole time and attention to perform the services required at *W.* and *B.*: held,

1. That in assessing the appellant as owner of the tithe commutation rent charge of *B.* to the poor rate, he was not entitled to any deduction in respect of the stipend of the curate of *B.*, inasmuch as, first, upon the facts stated, there was no such connection between *W.* and *B.* as that they could be considered one benefice, and therefore the appellant was in the position of an incumbent holding two benefices, and thereby bringing upon himself the necessity of employing a curate: and, secondly, the appellant received the tithe rent charge of *B.* as lessee of *Merton College*, with an undertaking to discharge the services at *B.* and not as vicar of *W.*

2. *Semble*, per *Cockburn C. J.* If *Merton College* received the tithe rent charge of *B.*, they would not be entitled to any deduction in respect of the stipend of a curate paid by them.

1861.

WHEELER
v.
Overseers of
BIRMINGHAM.

CASE stated under stat. 12 & 13 Vict. c. 45. s. 11.

The appellant is vicar of *Wolford*, in the county of *Warwick*, and is the lessee and occupier of the tithe rent charge of *Burmington*, in the same county, by virtue of a lease of the tithe rent charge granted to him by the Warden and Fellows of *Merton College, Oxford*.

The appellant was rated as such occupier, in respect of the rent charge, in a rate for the relief of the poor of the parish of *Burmington*, made the 28th October, 1858. Notice of appeal against the rate was given by the appellant, on the ground that he was over-rated, amongst other things, in this, that, in assessing his rent charge, the churchwardens and overseers had made no allowance or deduction in respect of the stipend of a curate paid by the appellant.

The parish of *Wolford* (or *Great Wolford*), before the appropriation of the rectory and the endowment of the vicarage hereinafter mentioned, comprised the townships or hamlets of *Great Wolford*, *Little Wolford*, *Burmington* and *Ditchford*. In *Great Wolford* was the mother church. *Little Wolford* still retains its original character of a hamlet to *Great Wolford*. In *Burmington* and *Ditchford*, chapels were built, and these hamlets became chapelries to *Wolford*. *Ditchford*, however, was subsequently transferred to the rectory of *Stretton on Fosse*, and, the chapel there having, in course of time, fallen into ruins, and being at length wholly destroyed, *Ditchford* became and now is a mere hamlet of *Stretton*.

In the Ecclesiastical Taxation of Pope *Nicholas IV.*, circa A. D. 1291, the rectory of *Wolvord*, with the chapelry of *Bovynnton*, is taxed at 26 marks. Twenty years later, as is shewn by the Originalia Roll of the 4th of

Edward II., the Warden of the House of Scholars of *Merton*, in *Oxford*, paid a fine of 10 marks to the King for a licence to appropriate the rectory of *Wolvord*, together with the chapel of *Bovynton*, which are in their own patronage; of this appropriation a record is preserved in the register of the Bishops of *Worcester*, and, under date two years later, there is found in the same register, and in a book called the "*Liber Ruber*," preserved amongst the documents belonging to the Dean and Chapter of *Worcester*, a record of the endowment of the vicarage of *Wolvord*, consequent upon the appropriation of the rectory, with a sum of 10*l.*, or, if that should prove insufficient, with such further sum as the Bishop should direct; and the vicar of *Wolvord* for the time being was, by the endowment deed, required (*inter alia*) to cause the chapel of *Bermerton*, existing in the said parish, to be served by a suitable priest. Nine years later (A. D. 1322), as appears by the Register of *Thomas Cobham*, Bishop of *Worcester*, a further endowment of the vicarage of *Wolvord* was made, under the powers (therein recited) reserved to the Bishop in the first deed of endowment; and the vicar is, by this second deed, to receive all the small tithes and offerings at the altar, as well of the mother church as of the chapels thereto annexed, in whatever way they may now or in future be assessed, these chapels being in the same deed named as *Ditchford* and *Bourmington*. If the provisions of this deed were ever carried out as regards the small tithes of the chapelries, such an arrangement cannot have been of long continuance.

It is admitted that the names *Bovynton*, *Burnynton*, *Bermerton*, and *Bourmington*, are synonymous with *Burmington*.

1861.

WHEELER
V.
Overseers of
BIRMINGHAM.

1861.

WHEELER

v.
Overseers of
BURMINGTON.

In the year 1616 *Burmington* had a parsonage house and glebe lands, and in the Registry of the Consistory Court of *Worcester* there is an ancient terrier of the date of 20th *January*, 1616, of all the glebe lands, leids, meadows and commons belonging to the parsonage of *Burmington*, wherein the parsonage house and various lands and closes are enumerated.

The chapel of *Burmington* appears to have been served either by a Fellow of *Merton College* or by curates appointed by that College, or by the vicar of *Wolford* or his curate. At length the chapel itself fell into ruins, but it appears, from an entry in an old register of *Wolford*, that, about 1693, the chapel was rebuilt, and the cure thereof restored to the church of *Wolford*, and an annual stipend of 20*l.* was granted to the curate out of the appropriate rectory. This stipend was afterwards reduced to 19*l.*, and then to 17*l.*, and has long ago altogether ceased. Its cessation was probably contemporaneous with an arrangement, made about the year —, by the patron and appropriators of *Wolford* and *Burmington* (*Merton College, Oxford*), that they would give a beneficial lease of rectorial tithes, arising from and out of the glebe situate at *Burmington*, to their senior resident Fellow, whether layman or clergyman, on condition (*inter alia*) of his providing for the cure of *Burmington*. This arrangement was, about the year 1817, so far modified as to restrict the enjoyment of this lease to the senior resident Fellow in Holy orders, who was to serve the cure of *Burmington*, *aut per se aut per alium*.

In the year 1834 the following resolution was passed by the Warden and Fellows of *Merton College, Oxford*. —“At a meeting of the Warden and Fellows, held,

April 4th, 1834, It was resolved that, when the lease of the great tithes of *Burmington* shall in future fall in, it shall not be granted to the senior resident Fellow of the College for the time being as heretofore, but shall be granted to the vicar for the time being of the vicarage of *Wolford*, in augmentation of his benefice, provided he shall continue to reside in the vicarage."

1861.

WHEELER
v.
Overseers of
BURMINGTON.

In 1842 an apportionment was made of a rent charge in lieu of the tithes of *Burmington*. The appellant was instituted, in 1843, to the vicarage of *Wolford* with its members, and received, in *November* 1847, a lease of the glebe of *Burmington* and rent charge in lieu of the rectorial tithes, under the following resolution of the appropriators. "At a meeting of the Warden and Fellows held *May* 31st, 1847, Mr. *Griffith*, the senior resident Fellow, having resigned the lease of the tithes of *Burmington*, a new lease was ordered to be drawn up and granted to the vicar of *Wolford*, pursuant to a resolution of the College passed in 1834." This lease was for twenty-one years if the appellant should so long continue the resident vicar of *Wolford*. (A copy of this lease accompanies the case, and may be referred to as part of it.)

The population of *Wolford* (that is, of the townships or hamlets of *Great* and *Little Wolford*) amounts to about 550, that of *Burmington* to about 200. The church at *Wolford* is between two and three miles distant from the chapel at *Burmington* by the nearest footpath. The Bishop of *Worcester* requires two full services to be performed every *Sunday*, both in the church and the chapel, and states, under his hand, that he should insist on the appointment of a curate for *Burmington* by the vicar of *Wolford*, in case he neglected or refused to appoint one. This power the Bishop

1861.

WHEELER
v.
Overseers of
BURMINGTON.

claimed and exercised during the time Mr. Griffith (hereinbefore mentioned) held the lease of the appropriation of *Burmington*, requiring that gentleman to have two full services at *Burmington*, instead of one, and to raise the curate's stipend from 50*l.* to 80*l.* a year.

In the records of the Diocese, A. D. 1692, *Burmington* is termed "the parochial chapelry of *Burmington*," but in all other entries in the registry, where mention is made of it (except as hereinafter is stated), it is styled a chapel to *Wolford*. There is no evidence in the Bishop's registry that *Burmington* was ever legally separated from *Wolford* and constituted a separate parish, nor any record of any clerk having been instituted, collated, inducted or licensed as perpetual curate to *Burmington*, and in the Visitation Rolls of the Diocese the vicar of *Wolford* is sometimes described simply as such vicar, at other times as vicar of *Wolford* with the chapelry of *Burmington* annexed. There are separate commutations of the tithe rent charges for *Great Wolford*, *Little Wolford* and *Burmington*. In the last named place there are rectorial tithes only (no vicarial tithes having been so far as is known ever paid there as distinct from the rectorial); but in the two *Wolfords* the rectorial and vicarial tithe rent charges are distinguished. There was also rectorial glebe in each of the three places, and vicarial glebe in *Great Wolford* only. The whole of the tithe and glebe appropriated to *Merton College* as above mentioned are by them leased to different persons. There are separate poor rates for both *Great* and *Little Wolford* and *Burmington* and separate manors of *Great Wolford*, *Little Wolford* and *Burmington*. At the courts leet held for *Burmington Manor*, constables and tithing men for *Burmington* have been appointed. *Burmington* is termed a parish in the award and all the proceedings for the

apportionment of the tithe rent charge in 1842, and in the enclosure award of 1844 of lands within it. In the Registry of the Consistory Court of *Worcester* of the year 1714 there is a terrier of all the tithes and glebes belonging to the parish of *Burmington*. And in the Bishop's register of baptisms, marriages and funerals, there is a register of baptisms, marriages and funerals in the parish of *Burmington* from 1711 to 1728. Burials and christenings appear also to have been performed at *Burmington* from 1583 to 1685. For about a century previous to the year 1847 the cure of *Burmington* was provided for by the consecutive lessees of the appropriate rectory, and not by the vicar of *Wolford*.

On the 19th *July*, 1851, the appellant, in consideration of 100*l.*, executed a conveyance to the Warden and Scholars of *Merton College* of a piece of ground which he purchased, as was stated in the said conveyance, for the purpose of erecting thereon a messuage and suitable conveniences for the residence of the officiating minister of the chapelry or cure of the said parish of *Burmington*, together with the messuage which he had erected thereon. This deed recited that the Warden and Scholars were seised of the appropriate rectory of the parish of *Burmington*, together with the glebe lands and rent charge in lieu of tithes thereto belonging, subject to the liability of serving the spiritual cure of the said rectory. In this deed the land and premises are described as situate in the parish of *Burmington*, and as being in the occupation of *George Domville Wheeler* as the officiating minister of the chapelry of *Burmington*.

In the answer and returns, made pursuant to the Act of Parliament 43 *G. 3. c. 144.*, by the overseers of the poor, *Little Wolford* is termed a parish.

1861.

 WHEELER
 v.
 Overseers of
 BURMINGTON.

1861.
 WHEELER
 v.
 Overseers of
 BURNINGTON.

The curate, whose stipend (80*l.* per annum) is paid by the appellant, is solely occupied with the parochial duties and services of *Burnington*, and is licensed only to the assistant curacy of that chapelry. The appellant does not perform any part of these duties, but confines himself to the performance of the parochial duties and services of *Wolford*.

The appellant, besides the vicarage of *Wolford*, holds the rectory of *Barcheston*, with the hamlet of *Willington*, which adjoins *Burnington*: this parish he serves by another curate.

It is agreed that the stipend paid to the curate is a reasonable stipend, and that it would be impossible for any one person devoting his whole time and attention to perform the services at present required at *Wolford* and *Burnington*.

Upon these facts, two justices for the county of *Warwick*, at a special Sessions for hearing appeals against rates made for the relief of the poor, holden at *Shipston upon Stour*, in the county of *Worcester*, for parts of *Worcestershire*, and also for the division of *Brailes*, in the county of *Warwick*, on the 16th *April*, 1859, decided that the respondents, in assessing the appellant to the poor rate in respect of the occupation of the rectorial tithe rent charge of *Burnington*, had done right in making no allowance or deduction in respect of the aforesaid curate's stipend.

The following were stated by the justices as the grounds of their decision.

1. That, although there was evidence of an ecclesiastical connection between *Burnington* and *Wolford* having in old times existed, yet that there was no evidence that the vicar of *Wolford* was, at the time the assessment was made, bound, as such vicar, to provide for the ser-

vice of *Burmington*. 2. That the vicar was bound to provide, and did provide, for the service of *Burmington*, not as being bound by virtue of any ecclesiastical dependence of the chapelry of *Burmington* on the vicarage of *Wolford* for its service, but by reason of the terms of his lease from *Merton College*, the provision for the performance of the ecclesiastical duties in *Burmington* being the condition on which he held the beneficial lease of the rectorial tithe rent charge of *Burmington*, and the consideration on his part for the advantages so enjoyed by him under that lease. 3. That, although it would be impossible for the same person to fulfil the duties of *Burmington* and *Wolford* as their duties are at present defined by the Bishop, and that although therefore the assistance of a curate is necessary to the appellant, who, being vicar of *Wolford*, has undertaken to serve the cure of *Burmington*, yet that the appellant is in the condition of a pluralist who holds two preferments, the full performance of the duties of which by himself is impossible : that such a curate is therefore a mere substitute for the incumbent, and therefore that no allowance should be made in respect of his stipend. (See *The Hackney and Lamberhurst Tithe Commutation Rent Charges (a)*). 4. That, even assuming the appellant's contention to be correct, that he is bound, as vicar of *Wolford*, independently of any arrangement between himself and *Merton College*, to provide for the service of *Burmington*, and that, therefore, the assistance of a curate is necessary to him as vicar, and that his case falls within the other rule laid down in *The Hackney and Lamberhurst Tithe Commutation Rent Charges*, the deduction should be made (if at all) in the assessment of the vicarial tithe rent charge of

1861.

WHEELER
v.
Overseers of
BURMINGTON.

(a) E. B. & E. 1.

1861.
 WHEELER
 v.
 Overseers of
 BURMINGTON.

Wolford, and not of the rectorial rent charge of *Burmington*. 5. That assuming, on the other hand, that the Warden and Fellows of *Merton College*, as appropriators of the tithe rent charge, are bound to provide for the spiritual cure of *Burmington*, then it appears that they have done so in appointing the appellant their curate for that purpose, and remunerating him by their grant of the beneficial lease of the tithe rent charge. 6. That, were it not for the provision in the lease of the tithe binding him to remain the resident vicar of *Wolford*, the duties of the cure of *Burmington* could be well performed by him, if he devoted his whole time and attention to them (*The Hackney and Lamberhurst Tithe Commutation Rent Charges (a)*); and that he is no more entitled to claim exemption or relief from poor rate than a bailiff, who is remunerated for his service by permission to occupy a house and land gratuitously or at a beneficial rent, would be entitled to claim exemption, partial or complete, from poor rate in respect of the house and land so occupied.

The question for the opinion of the Court was: Is the appellant entitled to have his assessment reduced by the amount of the stipend paid by him to a curate under the circumstances stated in the case, or by any proportionate part of such stipend.

The lease referred to in the case was an indenture, made the 24th *November*, 1847, between the Warden and Scholars of the House or College of Scholars of *Merton College*, in the University of *Oxford*, and the Rev. *George Domville Wheeler*, clerk, vicar of *Great Wolford*, in the county of *Warwick*, by which the Warden and Scholars, for divers considerations them moving, with

(a) *E. B. & E. 1.*

one assent and consent demised unto *George Domville Wheeler* the yearly rent charge of 214*l.*, awarded to the rector of the parish of *Burmington* in lieu of the great and rectorial tithes arising from all the lands in the parish; and the cottage and garden called the parsonage, and all the other glebe lands of the rectory or parsonage of *Burmington*: habendum from the 5th *April* then last for 21 years, if he should so long continue the resident vicar of *Great Welford*, reddendo 17*s.* 8*d.* in money and five bushels of wheat and one quarter of barley, or, for default of the five bushels of wheat and one quarter of barley, the price thereof. Covenant by the lessees to repair and maintain the chancel of the church of *Burmington*, and the parsonage house and premises. There were also the following covenants:—"And *George Domville Wheeler*, for himself, his executors and administrators, doth further covenant with the Warden and Scholars, and their successors, that he, *George Domville Wheeler*, shall and will serve the cure of the parsonage, either by himself or by a sufficient curate, during the said term, and shall and will clearly acquit and discharge the Warden and Scholars, and their successors, of the said cure, and all manner of charges thereunto belonging. And also that he, *George Domville Wheeler*, his executors or administrators, shall, at all times hereafter during the term, pay and discharge all manner of taxes, rates, assessments and impositions whatsoever payable out of or for the said rectory or parsonage and premises, or any part thereof (except the lessor's property tax), and therefrom keep indemnified the Warden and Scholars, and their successors. Provided also that *George Domville Wheeler*, his executors or administrators, shall not sell or assign all or any part of the demised

1861.

WHEELER
v.
Overseers of
BURMINGTON.

1861. premises, for all or any part of his or their estate or term of years therein, to any person whomsoever, without the special licence and consent of the Warden and Scholars, or their successors, for that purpose first obtained in writing under their common seal."

WHEELER
v.
Overseers of
BURMINGTON.

The case was argued (*November* 16th and 20th) by

The Attorney General, for the respondents.—First. If there is such an ecclesiastical relation between the vicarage of *Wolford* and the chapelry of *Burmington* that the appellant, as vicar of *Wolford*, is bound to perform Divine service in *Burmington*, he would, according to *Williams*, appellant, *The Churchwardens of Llangeinwen* (a), respondents, be entitled to a deduction in respect of the salary of a curate. But that deduction ought to be in the assessment of the vicarial tithe rent charge of *Wolford*, the obligation being on the appellant as vicar of *Wolford*, and not in the assessment of the rectorial rent charge of *Burmington*.

Secondly. The appellant was bound to perform Divine service in *Burmington*, not as vicar of *Wolford*, but exclusively under the terms of the lease of the rectorial tithe rent charge of *Burmington* from *Merton College*; his acceptance of the cure of *Burmington* was voluntary; and therefore he is in the condition of a clergyman holding two preferments, who is not entitled to a deduction in respect of the stipend of a curate, seeing that he must provide a curate for one of them. *The Hackney and Lamberhurst Tithe Commutation Rent Charges* (b), is an authority for the respondents.

(a) See the preceding case.

(b) *E. B. & E. 1.*

F. M. White, for the appellant.—First. The appellant, as vicar of *Wolford*, is bound to provide for the service of the chapelry of *Burmington*, being a chapelry annexed to the vicarage of *Wolford*. [He referred to the evidence stated in the case, shewing that in 1291, and twenty years later, *Wolford* and *Burmington* were treated as one benefice; and that in 1695 the cure of *Burmington* was restored to the church of *Wolford*; citing 1 *Burn's Eccl. Law*, by *Phillimore*, tit. *Appropriation*. iv. p. 91. He also referred to stat. 1 & 2 *Vict.* c. 106., as establishing a relation between the two benefices.] Then, according to the principle established in *The Hackney and Lamberhurst Tithe Commutation Rent Charges* (a), followed in *Williams*, app., *The Churchwardens of Llangeinwen*, resps. (b), it being found as a fact that it is impossible for the appellant, as vicar of *Wolford*, to perform the duties in *Burmington* without the assistance of a curate, a deduction ought to be made in respect of the stipend of such curate in assessing the rent charge of *Burmington* to the poor rate, which the appellant receives as part of the endowment for the performance of the duties in *Burmington*.

Secondly, assuming that the appellant is not bound to provide for the service of the chapelry of *Burmington*, except under the lease of the rectorial tithe rent charge of *Burmington* from *Merton College*, he ought to be in the same position with reference to the poor rate as the College would be, if they were in occupation of the rent charge. *Merton College*, as appropriators of the tithe rent charge of *Burmington*, are bound to provide for the service of the cure. The Bishop might sequester so much

1861.

WHEELER
v.
Overseers of
BURMINGTON.

(a) *E. B. & E.* 1. 41, 42. 50. 53.

(b) See the preceding case.

1861.
 WHEELER
 v.
 Overseers of
 BURMINGTON.

of the tithe rent charge of *Burmington* as was necessary for the maintenance of a curate. And the lessee takes the lease of the tithe rent charge, subject to the same liability: *Hitchcot v. Thornburrough*, 2 Roll. Abr. 337, tit. *Parson. Vicar.* H. 2. If the College retained the tithe rent charge in their own hands, and appointed a curate at a fixed salary, they would be entitled to a deduction in respect of the salary of the curate. The principle of rating recognised in *The Queen v. Adames* (a), before The Parochial Assessment Act, 6 & 7 W. 4. c. 96. (and that statute has not altered the law as to the rateability of property, *The Queen v. Lumsdaine* (b)), is "that all lands are to be assessed in proportion to the net rent which a tenant at rack rent would pay, he discharging all rates and outgoings:" and in this case the stipend of the curate would be an outgoing or charge imposed by law. The reasoning in the judgment of the Court in *The Hackney and Lamberhurst Tithe Commutation Rent Charges* (c), disallowing the claim which was made in that case for a deduction in respect of the personal services of the rector, does not apply to the case of a lay rector, who cannot perform the service in person. Further, the lease of the tithe rent charge from *Merton College* contains covenants by the appellant to pay all charges on the rectory and that he will not assign without the licence of the College.

The Attorney General, in reply.—[*Cockburn C. J.* We relieve you from replying on that part of the argument which proceeded on the ecclesiastical dependence of *Burmington* on *Wolford*.] In principle and reason,

(a) 4 B. & Ad. 61. 68.

(b) 10 A. & E. 157.

(c) E. B. & E. 1. 51, 52.

the appellant, with respect to the chapelry of *Burmington* and the parish of *Wolford*, is in the position of a pluralist: they are distinct sources of ecclesiastical income. The Court will not extend the principle of exemption in *The Hackney and Lamberhurst Tithe Commutation Rent Charges (a)*, to a case in which the employment of a curate is not the result of an inherent necessity in the benefice, but arises from circumstances which are within the control of the incumbent. The appellant might employ a curate at *Wolford*, and discharge the duties of the cure of *Burmington* in person, and then he would not be entitled to any deduction. [*Blackburn J.* The deduction in respect of the curate's salary which was allowed in *The Hackney and Lamberhurst Tithe Commutation Rent Charges (a)*, is an anomaly which I will not extend.]

1861.

WHEELER
v.
Overseers of
BURMINGTON.

COCKBURN C. J. I am of opinion that the appellant was rightly assessed to the poor rate in respect of the tithe rent charge of the parish of *Burmington*.

The objection taken by the appellant to his rateability rests on two grounds. First, that the parish of *Burmington* is to be taken as one with the parish of *Wolford*, and that the incumbent of *Wolford*, holding the two as one aggregate benefice, and being unable to discharge the spiritual duties in both without the assistance of a curate, is entitled to deduct from the amount at which he is rated the expence which he is put to in paying the stipend of a curate in *Burmington*. This proceeds on the assumption that *Burmington* and *Wolford* are inseparably and indissolubly connected. We may surmise, as a matter of fact, although the evidence is not conclusive, that at

(a) *E. B. & E.* 1, 53.

1861.

 WHEELER
 v.
 Overseers of
 BURMINGTON.

some remote period the chapelry of *Burmington* was a dependency of the spiritual parish of *Wolford*; but for a long series of years the two have been so dissociated that, in point of law, it is impossible to say that they form one benefice. This appears clear by considering that, on being appointed to the vicarage of *Wolford*, the vicar could not have insisted that he was entitled to the cure of the chapelry of *Burmington*, with its emoluments. For many years *Merton College* have been in the habit of dealing with *Burmington* as a separate and distinct benefice, sometimes paying the stipend for the performance of the clerical duties in *Burmington* to a curate independent of the vicar of *Wolford*, and sometimes paying the stipend for the performance of those duties to the vicar of *Wolford*, or making such other provision as to them seemed right: also the appellant was instituted to the vicarage of *Wolford* in 1843, and held it for four years before the College, upon the surrender of the lease of the great tithes of *Burmington* by the senior Fellow, made the appellant lessee of the tithe rent charge of *Burmington*, with the obligation of providing for the performance of the spiritual duties there. Under these circumstances it is impossible to contend that there is any such inseparable or indissoluble connection between *Wolford* and *Burmington* as that the two are to be considered one benefice.

That being so, the appellant stands in the position of a clergyman holding two separate benefices; and then *The Hackney and Lamberhurst Commutation Rent Charges* (a) is an authority for saying that, as incumbent of *Burmington*, he is not warranted in claiming to deduct

(a) *E. B. & E. 1, 52.*

the stipend of the curate whom he employs there: it was optional with him whether he would hold both benefices, and, by accepting the benefice of *Burmington*, he brought upon himself the necessity of employing a curate, and does so only in case of himself.

1861.

WHEELER
v.
Overseers of
BURMINGTON.

Secondly, it is said that, inasmuch as *Merton College* are the lay impropiators of the rent charge of *Burmington*, with the obligation to employ some minister of the Church of *England* to perform the spiritual duties of the cure, and as the discharge of that obligation is the condition under which they are entitled to take the rent charge in lieu of tithes, the stipend paid to the curate is a necessary outgoing, and ought to be deducted from the amount of the rent charge in ascertaining its rateable value. It is not necessary, for the present purpose, to say what would be our decision if *Merton College* themselves took the tithe rent charge, and, in satisfaction of their obligation to provide for the discharge of the spiritual duties, employed a curate and paid him a fixed stipend. But, without deciding the point, my own opinion is strong that, if *Merton College* had taken the rent charge, and appointed a curate in order to discharge their obligation as lay impropiators to provide for the spiritual wants of the parish, they could not claim to deduct the curate's stipend in ascertaining the rateable value of the rent charge. In the origin of impropriations the tithes of a parish were annexed to a spiritual corporation with a view to the discharge of the spiritual duties in that parish by some of its members. The whole tithes in the hands of a spiritual rector would be rateable; and I cannot conceive why, when the tithes have passed into the hands of a lay impropiator, he

1861. should not be bound to provide for the service of the
cure.

WHEELER
v.
Overseers of
BIRMINGHAM.

In the present case the whole of the tithe rent charge is placed at the disposal of a clergyman who happens to be vicar of an adjoining parish, on condition of his providing for the discharge of the spiritual duties; and I see no difference between a person who is thus placed in the position of a spiritual rector and the ordinary case of a spiritual rector: he takes the whole tithe rent charge as an ordinary rector does, and I do not see why he should be in a better position than an ordinary rector. Also, treating the appellant as a pluralist, who is obliged to employ a curate at *Birmingham*, because he cannot be in two places at the same time, the same result is arrived at. I agree with my brother *Blackburn* that the principle laid down in *The Hackney and Lamberhurst Tithe Commutation Rent Charges (a)*, as to allowing a deduction in respect of the stipend of a curate, ought not to be extended. Where the incumbent not being in the position of a voluntary pluralist is so circumstanced that his duties cannot be discharged by one man, then there is some reason for the exception to the general rule; but only in such a case ought any part of the tithe rent charge to be withdrawn from local taxation.

BLACKBURN J. (the only other Judge present). I am of the same opinion. If the facts were that the parishes of *Wolford* and *Birmingham* were one benefice, and the appellant took the tithe rent charges of *Wolford* and *Birmingham*, with the necessity of serving the cure both of the vicarage of *Wolford* and the curacy of *Birmingham*-

(a) *E. B. & E.* 1, 53.

ton, and he was compelled to employ a curate at *Burmington* to assist him in the proper discharge of his ministerial duties, the case would be within the principle of exemption in *The Hackney and Lamberhurst Tithe Commutation Rent Charges* (a). But, upon the facts stated in this case, we must take it that the tithe rent charge of *Burmington* is received by the appellant, not as vicar of *Wolford*, but because he is lessee of the tithes from *Merton College*, and as such has covenanted that he will render the spiritual services of this curacy. If he paid a money rent, there would be no deduction in respect of that; and it makes no difference that he pays in services instead of in money. He seeks to make a deduction in respect of the stipend paid to a curate, who is a substitute, which it is clear that he cannot do. The case of a lessee of a tithe rent charge is not within the authority of *The Hackney and Lamberhurst Tithe Commutation Rent Charges* (a), which is not to be followed, except where the facts are the same as in that case.

1861.

WHEELER
v.
Overseers of
BIRMINGHAM.

Judgment for the respondents.

(a) *E. B. & E.* 1. 53.

1861.

*Saturday,
November 23d.*

NAZER and others *against* WADE and another.

*Practice.
Omission to
reseat writ of
summons.
Statute of
Limitations.*

On the day of the expiration of a writ of summons issued under The Common Law Procedure Act, 1852 (15 & 16 *Vict.* c. 76.), the plaintiffs' attorney attended at the office for the purpose of having it renewed, and paid the fee; but being suddenly called away omitted to get the seal impressed in pursuance of sect. 11, and did not discover the mistake until it was too late to keep the writ alive by resealing, so as to save the Statute of Limitations: held, that the Court had no power to direct the officer to impress the seal on the writ as of the day when the attorney applied to have it renewed; but that it would have been otherwise if the omission to reseat the writ had been occasioned by a fault of the officer of the Court.

IN this case a writ of summons was issued under The Common Law Procedure Act, 1852 (15 & 16 *Vict.* c. 76.), which was renewed and resealed in *April*, 1861. On the 7th *October*, the plaintiffs' attorney attended at the office to have the writ again renewed, and paid the fee, but, being suddenly called away, he omitted to get the seal impressed; and did not discover the mistake until it was too late to keep the writ alive by resealing, so as to save the Statute of Limitations.

Pigott Serjt., on the 5th *November*, moved to have the seal impressed on the writ as of the 7th *October*. —[*Blackburn* J. This case, and several others involving the same question, came before me at chambers, when, doubting my power to assist the parties, I referred them to the Court.] The Courts have a power, which they frequently exercise, of amending their writs and other proceedings. This power seems inherent in all Courts of justice; in addition to which The Common Law Procedure Act, 1852 (15 & 16 *Vict.* c. 76.)

sect. 222, empowers the common law Courts "at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not." That section is cumulative on sect. 20, which enacts: "If the plaintiff or his attorney shall omit to insert in or indorse on any writ or copy thereof any of the matters required by this Act to be inserted therein or indorsed thereon, such writ or copy thereof shall not on that account be held void, but it may be set aside as irregular, or amended, upon application to be made to the Court out of which the same shall issue, or to a Judge; and such amendment may be made, upon any application to set aside the writ, upon such terms as to the Court or Judge may seem fit." If the Court itself had omitted, in proper time, to affix the seal on a writ, they would do it afterwards *nunc pro tunc*; consequently, when the omission has been made by their officer, they ought to direct him to do the same. Suppose the officer, when about to affix the seal, were seized with a fit, and the time expired before he could resume his post, or before another person was appointed to it; or suppose the party coming to the office to have the seal affixed were attacked in the like manner, would not the Court interfere? [*Wightman J.* I do not know that. Parties should not drive these matters off to the last moment.] The Uniformity of Process Act, 2 *W.* 4. c. 39. s. 10. provides: "No first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, &c., unless every writ issued in continuation of a preceding writ shall &c., and shall contain a memorandum

1861.

 NAHER
 V.
 WADE.

1861.

 NAZAR
 v.
 WADE.

indorsed thereon or subscribed thereto, specifying the day of the date of the first writ." Under this Act the Court allowed a plaintiff to amend an alias and a pluries writ of summons by indorsing thereon the day of the date of the first writ of summons, and of the return thereto; the object of the amendment being to save the Statute of Limitations; *Culverwell v. Nugee* (a). [*Wightman J. Campbell v. Smart* (b), which was decided under that statute, is an authority against you. You are not asking us to amend an old writ, but to issue a new one.] No; for this writ, when resealed, will be a mere continuance of the original one. [*Cockburn C. J.* If the old writ were still alive, but defective, the Court could amend it; but here it is dead, for The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76.) sect. 11, says: "No original writ of summons shall be in force for more than six months from the day of the date thereof, including the day of such date." *Blackburn J.* You want us to set our seal to what is untrue, namely that this writ was sealed within six months after the issuing of the former one. *Wightman J.* If you are entitled to make this sort of application now, you might make it after any lapse of time.] The Court would have a right to refuse the application unless made within a reasonable time. An amendment of a writ of summons and all subsequent proceedings, by adding the names of other parties as co-plaintiffs, has been allowed; *Carne v. Malins* (c). [*Cockburn C. J.* There the writ was still in existence.] So an amendment has been allowed in the date of a pluries writ of summons, though the Statute of Limitations had run out; the Court holding that they had power under 15 & 16 Vict. c. 76., if not

(a) 15 M. & W. 559.

(b) 5 C. B. 196.

(c) 6 Exch. 803.

independently of it; *Cornish v. Hockin* (a). [*Wightman J.* That was a case of mere irregularity.] In *Chitty's Forms*, p. 49, 8th ed., it is said: "In a case where the writ had been issued on the 1st *November*, duly renewed on the 1st *May*, and then tendered for further renewal on the next 1st *November*, but the officer of the Court refused to seal it, the Court directed him to affix the proper seal *nunc pro tunc* as of the day on which it was tendered, saying that it might be done *quantum valeat*, and that the error, if any, would appear upon the record;" and two anonymous cases (b) and *Campbell v. Smart* (c) are referred to.

1861.

NAZER

V.
WADE.

THE COURT (consisting of COCKBURN C. J., WIGHTMAN and BLACKBURN JJ.) said they would consult the other Judges on the subject, as it was desirable there should be some uniform rule in the Courts upon it. They would assist the plaintiffs if they could, but doubted whether their power to do so had not been taken away by the statute.

Cur. adv. vult.

BLACKBURN J. now delivered judgment, saying that, having consulted a majority of the Judges of the other Courts, the Court were unanimously of opinion that they had no jurisdiction to make such an order as was here asked for, unless in cases where the mischief had been occasioned by a fault in the officer of the Court.

Rule refused.

(a) 1 E. & B. 602.

(b) 18 *Jur.* 1104; 24 *L. J. Q. B.* 23; 18 *Jur.* 1017; 24 *L. J. C. P.* 1; 24 *L. T.* 61.

(c) 5 *C. B.* 196.

1861.

Saturday,
November 9th.

The QUEEN against The Inhabitants of BRAMLEY.

Pauper lunatics,
16 & 17 Vict.
c. 97. s. 97.
Gilbert's
Act (22 G. 3.
c. 83.)

The expression "Union," in the 16 & 17 *Vict. c. 97. s. 97.*, relative to the settlement and expences incurred in respect of pauper lunatics, applies to a union formed under *Gilbert's Act (22 G. 3. c. 83.)*

TWO justices of the peace for the borough of *Leeds* adjudged the settlement of *Elizabeth Watson*, a pauper lunatic, then confined in the pauper lunatic asylum at *Stanley cum Wrenthorpe*, in the West Riding of *Yorkshire*, to be in the parish of *Tatham*, in the county of *Lancaster*, a parish comprised or incorporated within a union formed under the provisions of stat. 22 *G. 3. c. 83.*, to wit, the *Caton Union*, in that county; and ordered the guardians of the poor of the *Caton Union* to pay to the guardians of the poor of the township of *Bramley*, in the borough of *Leeds*, in that Riding, certain sums of money therein alleged to have been incurred by that township in and about the examination of the said *E. W.*, and her conveyance to the said asylum, and a certain other sum of money paid by them to the treasurer of the asylum for her maintenance in it, and other sums of money therein mentioned. Against this order the guardian, churchwardens and overseers of *Tatham* appealed to the Quarter Sessions of the West Riding of *Yorkshire*, holden at *Leeds*; which discharged the order subject to the following case.

On and before the 22nd *June*, 1860, *Elizabeth Watson*, a lunatic pauper, was confined in the asylum at *Stanley cum Wrenthorpe*, in the West Riding of the

county of *York*, pursuant to an order in that behalf: and thereupon the following order, adjudicating her settlement and ordering payment of her maintenance, was made.

1861.

The QUEEN
v.
Inhabitants of
BRAMLEY.

“Borough of *Leeds*, in the West Riding of *Yorkshire*, to wit.] To the guardians and overseers of the poor of the parish, township or place of *Tatham*, in a certain union formed according to law, called the *Caton* Union, in the county of *Lancaster*, and to the guardians of the poor of the same union, and to each and every of them. Whereas the overseers of the poor of the township of *Bramley*, in the borough of *Leeds*, being a borough situate within the West Riding of the county of *York*, this day complain to us, two of Her Majesty’s justices of the peace in and for the said borough (one of the quorum) whose names are hereunto set and seals affixed, and give us to be informed that heretofore, to wit, on the 3d *September* A. D. 1859, at the instance of the overseers of the poor of the said township of *Bramley* (the said township of *Bramley* being then, and from thence hitherto, and still, a township not within any union) one of Her Majesty’s justices of the peace in and for the said borough, pursuant to the provisions and according to the form of an Act of Parliament made in the session of Parliament holden in the 16th and 17th years of the reign of our lady the now Queen ‘To consolidate and amend the laws for the provision and regulation of lunatic asylums for counties and boroughs and for the maintenance and care of pauper lunatics in *England*,’ duly made an order under his hand, pursuant to the statute in such case made and provided, directing *Elizabeth Watson*, a pauper lunatic then and there brought before him, to be received into the lunatic asylum at

1861.
The QUEEN
v.
Inhabitants of
BRAMLEY.

Stanley cum Wrenthorpe, in the county of *York*. And that the said *Elizabeth Watson* was afterwards, to wit, on the said 3d *September*, in the year last aforesaid, by virtue of the said order, pursuant to the statute in such case made and provided, conveyed from the said township of *Bramley* to, and was then and there delivered, along with a duplicate of the said order, and of the statement thereunto subjoined as is hereinafter mentioned, to the superintendant of the said asylum, and was then and there received and confined in the said asylum, and from thence continually hitherto hath been, and still is, confined in the said asylum under and by virtue of the provisions of the said first mentioned Act and the said last mentioned order, as a pauper lunatic in the said asylum; and that the said *Elizabeth Watson*, during all the time in that behalf aforesaid, hath been, and still is, maintained there in the said asylum under and in pursuance of the said order in that behalf aforesaid, and at the costs and charges of the said township of *Bramley*, out of the rates raised for the relief of the poor of that township. And that the said justice, before making such order, that is to say, when the said *Elizabeth Watson* was brought before him as aforesaid, to wit at *Leeds* aforesaid, in the said borough, called to his assistance *William Swift Wade*, a surgeon and apothecary, and he the said justice, having then and there, with the assistance aforesaid, personally examined the said *Elizabeth Watson*, was then and there, on such personal examination and other proof, satisfied that the said *Elizabeth Watson* was then lunatic, and a proper person to be confined. And that the said *William Swift Wade* then and there, before the making of the said order, signed a certificate, according to the form in Sche-

dule (F.) No. 3 to the said first mentioned Act annexed, that the said *Elizabeth Watson* was then lunatic. And the said overseers of the poor of the said township of *Bramley* further complain and give us to be informed that to the said order was subjoined a statement respecting the said *Elizabeth Watson* according to the form of the statute in such case made and provided. And that, at the time of making the said order, the place of the last legal settlement of the said *Elizabeth Watson* was not ascertained. Now therefore we, the said first mentioned justices, having, as such justices in and for the said borough, and pursuant to the statutes in such case made and provided, inquired, on the hearing of the said complaint and information, into the several premises, and into the legal settlement of the said *Elizabeth Watson*: and the said complainants, on behalf of the said township of *Bramley*, having now here ascertained and established before us, by satisfactory evidence upon oath according to law, the truth of all and singular the premises, and that the said *Elizabeth Watson*, during all the time aforesaid, was and is now legally settled in the said parish, township or place of *Tatham*, in the said county of *Lancaster*, do by this our order adjudge that all and singular the premises are true, and that the place of the last legal settlement of the said *Elizabeth Watson*, at the time of the making of the said order hereinbefore mentioned, and from thence continually hitherto, hath been, and still is, in the said parish, township or place of *Tatham*. And whereas it is now duly proved to us the said first mentioned justices, as well upon the oath of the assistant overseer of the poor of the said township of *Bramley* as otherwise, that the expences incurred by and on behalf of the said township of *Bramley* in and

1861.

The QUEEN
v.
Inhabitants of
BRAMLEY.

1861. about the examination of the said *Elizabeth Watson* as
 The QUEEN last aforesaid, and her conveyance to the said asylum as
 V. aforesaid, amount to 11. 15s. ; and that the monies paid
 Inhabitants of by the said township of *Bramley* to the treasurer of the
 BRAMLEY. said asylum for the lodging, maintenance, medicine,
 clothing and care of the said *Elizabeth Watson* there,
 and incurred within twelve calendar months next pre-
 vious to the date of this our order (to wit), from the 3d
September last up to the 14th day of *June* instant, amount
 to the sum of 16l. 4s. 4d. : We the said first mentioned
 justices do hereby further adjudge the premises aforesaid
 to be true, and we do order the guardians of the poor of
 the said *Caton Union*, out of any monies which may be
 in or come into their hands by virtue of their office as
 such guardians, to pay to the overseers of the poor of
 the township of *Bramley* aforesaid, the said sum of 11. 15s.,
 being the reasonable expences incurred by the said town-
 ship of *Bramley* in and about the said examination of
 the said *Elizabeth Watson*, and her conveyance to the
 said asylum as aforesaid ; and also the further sum of
 16l. 4s. 4d. to the said overseers of the poor of the said
 township of *Bramley*, being the amount so paid by them
 to the treasurer of the asylum at *Stanley cum Wrenthorpe*
 as aforesaid. And we the said first mentioned justices
 do also hereby further order you, the said guardians of
 the poor of the said *Caton Union*, and all and every the
 guardians of the poor for the time, from time to time,
 being of the *Caton Union*, out of any monies which
 may be in or come into your or their hands by virtue
 of your or their offices as such guardians, to pay weekly
 and every week to the treasurer of the said asylum,
 from the 14th *June* instant, so long as the said *Eliza-
 beth Watson* shall continue in the said asylum by virtue

of the said order in that behalf, and so long as it shall not be otherwise ordered by competent authority in that behalf according to law, the sum of 8s. for the future lodging, maintenance, medicine, clothing and care of the said *Elizabeth Watson*, which said sum appears to us, the said justices, to be reasonable for the future lodging, maintenance, medicine, clothing and care as aforesaid; and for your and their paying the said sums of money and charges herein directed to be paid this shall be your warrant. Given under our hands and seals at *Leeds*, in and for the said borough, the 22d *June*, in the year of our Lord 1860.

1861.

The QUEEN
v.
Inhabitants of
BRAMLEY.

"*Wm. Kitsall*." (L. s.)

"*Robert Hudson*." (L. s.)

The parish of *Tatham* is one of several parishes and townships which, together, form a Poor Law Union, commonly called a *Gilbert Union*, duly formed and incorporated in the year 1829, pursuant to the provisions of the statute 22 *Geo. 3. c. 83.*, for the better relief and employment of the poor of the aforesaid several parishes and townships, under the name of the Visitors and Guardians of the Poor of the several townships forming the *Caton Union* or Incorporation; and at the date of the said order the guardians of the poor of the said several parishes and townships respectively had been duly appointed and were then acting as such guardians, within the *Caton Union*, under the powers and authority of the above statute and of those statutes which regulate the unions formed under its provisions, and incorporated under it. The appellants against the above order of 22d *June*, 1860, were the guardian of the poor of the parish of *Tatham* and the churchwardens

1861.
 The QUEEN
 v.
 Inhabitants of
 BRAMLEY.

and overseers of the poor of the same parish : and at the hearing of the appeal they objected to the order as invalid, the same being improperly made upon the guardians of the poor of the union called the *Caton* Union, and directing them, the guardians of the poor of that union, to pay the said several sums mentioned in the said order ; inasmuch as no such guardians existed in law or in fact able to obey it, and having funds for such purpose ; and that the order ought to have been made upon and addressed to the guardian acting for the said parish of *Tatham* only. The counsel for the respondents at the hearing expressly declined to ask the Court of Quarter Sessions to amend the said order in this respect, even if the Court of Quarter Sessions should be of opinion that by law they had power so to amend the same. The Court of Quarter Sessions, being of opinion that the above objection was well founded, and that the said order, as seeking to charge the parish of *Tatham*, was on the face of it invalid and bad in law, discharged the order.

If the Court of Queen's Bench shall be of opinion that the said order, bearing date the 22d *June*, 1860, was valid, as being properly made upon the guardians of the poor of the *Caton* Union, then the order of the Court of Quarter Sessions discharging that order is to be quashed. But if the Court of Queen's Bench shall be of opinion that the said order of 22d day of *June*, 1860, is invalid and bad, as seeking to charge the parish of *Tatham*, then the order of the Court of Quarter Sessions discharging that order is to stand confirmed.

West and *E. A. Lascelles*, in support of the order of the Quarter Sessions.—The Quarter Sessions did right

in discharging the order of the justices. The question depends on the 16 & 17 *Vict. c. 97. s. 97.*, which enacts,—
 “It shall be lawful for any two justices for the county or borough in which any asylum, registered hospital, or licensed house in which any pauper lunatic is or has been confined is situate, or to which such asylum wholly or in part belongs, or from any part of which any pauper lunatic is or has been sent for confinement, at any time to inquire into the last legal settlement of such pauper lunatic, and if satisfactory evidence can be obtained as to such settlement in any parish, such justices shall, by order under their hands and seals, adjudge such settlement accordingly, and order the guardians of the union to which the parish in which such lunatic is adjudged to be settled belongs, or of such parish in case such parish be in a union or be under a board of guardians, and if not, then the overseers of such parish, to pay to the guardians of any union or parish, or the overseers of any parish, all expenses incurred by or on behalf of such union or parish in or about the examination of such lunatic, and the bringing him before a justice or justices, and his conveyance to the asylum, hospital, or house, and of all monies paid by such last mentioned guardians or overseers to the treasurer, officer, or proprietor of the asylum, hospital, or house, for the lodging, maintenance, medicine, clothing, and care of such lunatic, and incurred within twelve calendar months previous to the date of such order, and, if such lunatic is still in confinement, also to pay to the treasurer, officer, or proprietor of the asylum, hospital, or house the reasonable charges of the future lodging, maintenance, medicine, clothing, and care of such lunatic; and the guardians or overseers on whom any such order is made shall immediately pay to the

1861.

The QUEEN
 v.
 Inhabitants of
 BRAMLEY.

1861.
 The QUEEN
 v.
 Inhabitants of
 BRAMLEY.

guardians or overseers to whom the same are ordered to be paid the amount of the expenses and monies by such order directed to be paid to them, and from time to time pay to the said treasurer, officer, or proprietor of the asylum, hospital, or house, the future charges aforesaid." The word "union" in this section does not include a union under *Gilbert's Act*, 22 *G. 3. c. 83.*, and consequently where a pauper belongs to a parish within such a union, the order, under the 16 & 17 *Vict. c. 97. s. 97.*, should not be made on the guardians of the union as was done here. It is true that the interpretation clause, sect. 132, enacts, "In this Act the words and expressions following shall have the several meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction; (that is to say,) 'Union' shall mean a union of parishes formed under the Act of the 5th year of King *William the Fourth*, intituled An Act for the amendment and better administration of the laws relating to the relief of the poor in *England and Wales*, or under the Act of the 22d year of King *George the Third*, intituled, An Act for the better relief and employment of the poor, or incorporated or united for the relief or maintenance of the poor under any local Act." But here the subject is repugnant to the construction which would render the interpretation clause applicable, for the constitution of boards of guardians under the 22 *G. 3. c. 83.* differs from that of boards of guardians under the Poor Law Amendment Act, 4 & 5 *W. 4. c. 76.* Throughout the former Act, "guardians of the union" are not mentioned. Each parish in the union elects a guardian to act for itself, and there is one general treasurer for the union, in whose hands its money remains to be administered by

him under the control of the visitors; not under that of the guardians, who have no means of getting it out of his hands. (They cited the 4th, 7th, 8th, 35th, 38th and 43d sects. of the 22 G. 3. c. 83., together with the schedule Nos. 11 and 15 to that statute.) Sect. 107 of stat. 16 & 17 Vict. c. 97. enacts: "The overseers of any parish, and the guardians of any union or parish, and the clerk of the peace of any county, obtaining any order under this Act adjudging the settlement of any lunatic to be in any parish, shall, within a reasonable time after such order has been made, send or deliver, by post or otherwise to the overseers or guardians of the parish in which such lunatic is adjudged to be settled, a copy or duplicate of such order, and also a statement in writing under their or his hands or hand, or, where they are the guardians of a union or parish under the hands of any three or more of such guardians, stating the description and address of the overseers, guardians, or clerk of the peace obtaining such order, and the place of confinement of the lunatic, and setting forth the grounds of such adjudication, including the particulars of any settlement or settlements relied upon in support thereof, &c." And sect. 108: "If the guardians of any union or parish, or the overseers of any parish, feel aggrieved by any such order as aforesaid adjudging the settlement of any lunatic, they or he may appeal against the same to the next general quarter sessions of the peace, &c." *Reg. v. The Justices of the West Riding (a)* does not turn on the same point as the present case does; but on 22 G. 3. c. 83. being cited in the course of the argument, *Erle J.* said, "That Act cannot assist us, as it makes the guardian a parish, not an

1861.

The QUEEN
v.
Inhabitants of
BRAMLEY.

(a) 26 L. J. M. C. 41.

1861.

The QUEEN
v.
Inhabitants of
BRANLEY.

union, officer." In *Reg. v. The Inhabitants of Heaton* (a) it was held that where the order of adjudication of the settlement of a pauper lunatic is obtained by the guardians of a union on behalf of a township, the proper persons to sign the statement of the grounds of adjudication and of the particulars of settlement required by 16 & 17 *Vict. c. 97. s. 107.* are the overseers of the township. *Erle J.* there says: "The tenor of the decisions is to make those parties the *domini litis* whose money was at stake, and on whose behalf the order was obtained." In *Reg. v. The Inhabitants of Liverpool* (b) it was held that the Quarter Sessions have no power, under sect. 113 of this Act, to amend an order by inserting "guardians of the poor" instead of "churchwardens and overseers of the poor." *Reg. v. The Guardians of the Poor of Lambeth* and *Reg. v. The Inhabitants of St. Mary, Southampton* (c), decided on the construction of a local Act, whereby several parishes were united for the relief of the poor, favour the decision of the Quarter Sessions in this case.

Welsby, contra.—The true construction of the 16 & 17 *Vict. c. 97. s. 97.* is that the order to pay shall be made on the board of guardians of the union when the parish is in a union; on the board of guardians of the parish when, under The Poor Law Amendment Act, 4 & 5 *W. 4. c. 76. s. 89.*, there is such a board in a parish not united to others in a union; and in all other cases on the overseers of the parish: and that section should be punctuated accordingly. The present case comes under the last of these heads; for there is no board of guardians for each parish in this union, but each parish elects

(a) 28 *L. J. M. C.* 181.(b) 29 *L. J. M. C.* 137.(c) 5 *Q. B.* 513.

one guardian for the union, who, together, form the board of guardians for the union.

1861.

The QUEEN
v.
Inhabitants of
BRAMLEY.

It is contended by the other side that this enactment does not apply to unions under the *Gilbert Act*; but the interpretation clause says that it shall apply to them. It is not correct to say that money in the hands of the treasurer of a *Gilbert Union* cannot be got at by the guardians: for the 12th section provides for that, and by the subsequent statute, 41 *G. 3. c. 9. s. 3.*, it may be recovered before two justices of the peace. *Gilbert's Act* has also been modified by other subsequent statutes. The Poor Law Amendment Act, 4 & 5 *W. 4. c. 76. s. 54.*, enacts that "the ordering, giving, and directing of all relief to the poor of any parish which, according to the provisions of any of the said recited Acts" (among which was *Gilbert's Act*) &c., "shall be under the government and control of any guardians of the poor, or of any select vestry, and whether forming part of any union or incorporation or not, (but subject in all cases to, and saving and excepting the powers of, the said Commissioners appointed under this Act,) shall appertain and belong exclusively to such guardians of the poor or select vestry, according to the respective provisions of the Acts under which such guardians or select vestry may have been or shall be, appointed; &c." [He was then stopped, and *J. B. Maule*, who was with him, was not heard.]

COCKBURN C. J. I am satisfied that the expression "Union," in the 16 & 17 *Vict. c. 97. s. 97.*, applies to the case of *Gilbert Unions*; for, although the section does not do so in terms, the interpretation clause, sect. 182,

1861.
 The QUEEN
 v.
 Inhabitants of
 BRAMLEY.

says that it shall apply to them. We do not see how any practical injustice or wrong can be done by this construction being put upon the Act, for it is plain that if this pauper were now in his own parish, instead of that which obtained this order, he would be removed to the union workhouse, and, under the provisions of *Gilbert's Act* and the 41 *G. 3. c. 9. s. 3.*, be maintained by the common fund of the union, to which his own parish would have to contribute.

BLACKBURN J. (the only other Judge present.) I am of the same opinion. It is not necessary to consider the question which has been argued as to the internal management of the *Gilbert Unions*, for, even supposing Mr. *West* and Mr. *Lascelles* right on that matter, the case comes literally within the words of the sections before us. If, indeed we saw that the effect of our so holding would be to give validity to an order for payment of money on a party who had no means of getting at it, the case might be different; but as it is clear that, after the money is paid out of the funds of the union, the charge will, in the end come on the parish to which the pauper belongs, there is no reason for saying that the Legislature did not mean what they have said.

Order of Sessions quashed.

1861.

JACKSON and Wife and others *against* THOMASON.Thursday,
November 14th.

A statement to contradict the evidence of a witness under The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125.), sect. 22, may be contained in a series of documents, not one of which, taken by itself, would amount to a contradiction of his evidence.

Quære, per Cockburn, C. J., whether, independent of that statute, if a party, in order to prove a will, calls an attesting witness, who gives evidence invalidating the will, it is not competent to the party calling him to give evidence to discredit him, as, for instance, by shewing that he has been corrupted by the heir at law?

*Contradicting
witness.
Common Law
Procedure Act,
1854 (17 & 18
Vict. c. 125.),
sect. 22.*

THIS was an action of ejectment, in which the plaintiffs claimed to recover certain premises as heirs at law of *J. H.*, and the defendant defended as tenant to the widow of *J. H.*, who claimed as sole devisee under his will.

On the trial, before *Keating J.*, at the *Liverpool Spring Assizes*, 1861, the plaintiffs having proved their title as heirs at law, the defendant proceeded to prove the will, and for this purpose called one of the attesting witnesses, whose testimony shewed that the will had not been executed in the manner required by law. In order to contradict this, the defendant offered in evidence several letters of the witness to the widow, admitted by himself to be genuine, in which he had, as was alleged, given an account inconsistent with his testimony. This evidence was objected to, but was received by the Judge, and, the plaintiffs having given evidence in reply, the case was left to the jury, who found for the defendant.

Monk, in *Easter Term*, obtained a rule for a new trial,

VOL. L

3 D

B. & S.

1861. on the ground that the evidence had been improperly received.

JACKSON
v.
THOMASON.

Edward James and *R. G. Williams* appeared to shew cause ; but the Court called on

Monk and *Mihward* to support the rule.—Previous to The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125.), s. 22., a party was not allowed to discredit his own witness, as was sought to be done on this occasion. That section enacts: "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the Judge prove adverse, contradict him by other evidence, or, by leave of the Judge, prove that he has made at other times a statement inconsistent with his present testimony ; but, before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." Not one of the letters produced here, taken by itself, amounts to a contradiction of the testimony given by the witness. (In order to shew this, they proceeded to read and comment on the letters.)

COCKBURN C. J. Taken together, these letters amount to a contradiction of the testimony of the witness. It would frustrate a very valuable provision of this statute if we were to hold that, when a series of letters gives the required result, they may not be all taken together for that purpose because, singly, they would be insuffi-

cient. Each letter might contain an admission of some fact, and all the facts thus admitted might make up a contradiction. The effect of them is for the jury.

For the decision of this case it is sufficient to say that, under the statute, these letters are admissible; but I doubt very much if the statute is wanted at all here. I know of no authority that a party who claims under a will, and consequently is *compelled* to call the attesting witnesses to it, cannot, in the event of one of them disproving the will, give evidence to discredit him; as, for instance, by shewing that he has been corrupted by the heir at law.

WIGHTMAN J. concurred.

BLACKBURN J. The Judge must see that the evidence, i. e. in this case the letters, is such that the jury might fairly draw from it the conclusion that the testimony given by the witness was untrue. When he has got thus far, the evidence is admissible, although it may not prove the point for which it was adduced.

Rule discharged.

The Trustees of the SUNK ISLAND TURNPIKE ROAD, appellants, *against* The Surveyors of the Highways of the Parish of PATRINGTON, respondents.

Saturday,
November 16th.

Highway.
Turnpike
road.
4 & 5 Vict.
c. 59.

1. The 4 & 5 *Vict. c. 59.* applies to turnpike roads not in existence at the time when it was passed.

2. A turnpike trust is not the less a turnpike trust within that Act because the funds of it are derived from other sources than from tolls taken on the road.

1861.

Trustees of
SUNK ISLAND
Turnpike
Road
v.

. PATRINGTON.

3. A turnpike trust may be within the provisions of stat. 4 & 5 *Vict. c. 59.*, although the road was made and the tolls are taken under a public general statute.

THIS was a case stated under 20 & 21 *Vict. c. 43. s. 2.*

At a special Session for the highways for the division of *South Holderness*, in the East Riding of *Yorkshire*, an information was exhibited by the clerk to the trustees of the *Sunk Island* turnpike trust, under the provisions of the statute 4 & 5 *Vict. c. 59.* (since annually continued), stating that the funds of such turnpike trust were insufficient for the repairs of the turnpike roads comprised therein, part whereof were situate within the parish of *Patrington*, in the division and riding aforesaid, and praying that they would adjudge and order that such portion as they might think necessary of the rates levied for the repairs of the highways of the parish of *Patrington* should be paid by the surveyors to the trustees of the turnpike road, or their treasurer, for and towards the repairs of such part of the turnpike road as lies within the said parish of *Patrington*.

The turnpike road in question was made under the provisions of stat. 15 & 16 *Vict. c. 45.*, passed for an unlimited period, intituled "An Act for making a turnpike road between *Stone Creek* and *Sunk Island Church* in the county of *York*, and between *Sunk Island Church* and *Patrington Haven*, and for consolidating with such roads the present turnpike road from *Sunk Island Church* to *Ottringham*, and for constructing quays and wharfs at *Stone Creek*;" by which Act, after reciting that it would be of great benefit, not only to Her Majesty, as the owner of *Sunk Island*, but to the other owners, inhabitants, and occupiers of lands in the parishes of *Sunk Island*, *Ottringham*, and *Patrington*, and to the public at

large, if powers were given to widen and convert into, and use and maintain as, a turnpike road a then existing occupation road and certain other roads therein named, and to consolidate a then existing turnpike road from *Ottringham* to *Sunk Island* Church (made under the authority of stat. 6 & 7 *W. 4. c. 91.*) with such new turnpike roads, and to place the whole under the management of the Commissioners of Her Majesty's Woods, Forests, and Land Revenues: it is enacted, that the Commissioners of Her Majesty's Woods, Forests, and Land Revenues for the time being, and such other persons (being duly qualified) as should be nominated and appointed by them, should be the trustees for carrying the said Act into execution, so far as relates to the making and maintaining of turnpike roads, and that the Commissioner or Commissioners for the time being of Her Majesty's Woods, Forests and Land Revenues having the management and direction of the land revenues of the Crown in the parish of *Sunk Island* should have full power to carry into effect all the powers and authorities by this Act vested in the Commissioners for the time being of Her Majesty's Woods, Forests, and Land Revenues; and, after the usual provisions for making the turnpike roads, and giving powers for levying tolls and the construction, when and as and in such manner as the said Commissioners should think expedient, of any quays, wharfs or landing places, with or without warehouses, sheds or other convenient buildings at *Stone Creek* aforesaid, and demand wharfage dues in respect of vessels using such quays, wharfs or landing places, except for shelter in stress of weather, it is by the 16th section further enacted that, for the purpose of

1861.

Trustees of
SUNK ISLAND
Turnpike
Road
V.
PATRINGTON.

1861.

Trustees of
SUNK ISLAND
Turnpike
Road
v.

PATRINGTON.

defraying the expense of making the several roads, quays, wharfs, warehouses, buildings and works thereby authorized to be made, and also for discharging all debts (if any) then due by the trustees of the said existing turnpike road from *Ottringham* to *Sunk Island Church*, it should be lawful for the Commissioners of Her Majesty's Woods, Forests, and Land Revenues to advance and apply, out of the capital of the land revenues of the Crown, from time to time, such monies as should be necessary, not exceeding in the whole the sum of 4000*l.*, to be repaid as thereafter provided. And by the 17th section it is enacted that all the monies which should be produced from the tolls, rates, duties, and penalties thereby authorized to be taken and levied, should be vested in the Commissioners of Her Majesty's Woods, Forests, and Land Revenues for the time being, and should be applied, in the first place, in keeping in good and sufficient repair the roads, wharfs, quays, warehouses, buildings, and works so constructed as aforesaid, and providing for the efficient collection of the tolls; secondly, in payment of the expenses of making such roads and constructing such quays, wharfs, warehouses and buildings; thirdly, in repaying to the capital of the land revenues of the Crown, yearly, until the whole should be repaid, one twentieth part of the monies advanced; and, subject as aforesaid, all the produce of the said tolls, rates, and other payments should be paid to, and constitute part of, the annual land revenue of the Crown: Provided, that if in any year the said tolls, rates, and other payments should be insufficient to repay the one twentieth part of the capital advanced as thereinbefore mentioned, the deficiency should be made good out of

the general annual land revenue of the Crown, so that the whole capital advanced should be replaced in twenty years.

By the statute 4 & 5 *Vict. c. 59.*, intituled "An Act to authorize for one year, and until the end of the then next session of Parliament, the application of a portion of the highway rates to turnpike roads, in certain cases," which has been since annually continued, and by 17 & 18 *Vict. c. 52.*, continued until the 1st *October*, 1860, and to the end of the then next session of Parliament; after stating that the revenues of some turnpike roads are so unequal to the charge and maintenance of such roads, after paying the interest and principal of the sums due upon mortgage of the tolls thereof, when deprived of the aid theretofore derived from statute duty, that it was necessary that some additional provision should be made for such roads for a limited period, it is enacted by section 1, That it should be lawful for the justices at any special sessions for the highways holden after the passing of that Act, upon information exhibited before them by the clerk or treasurer of any turnpike trust that the funds of the said trust are insufficient for the repairs of the turnpike roads within any parish, to examine the state of the revenues and debts of such turnpike trusts, and to inquire into the state and condition of the repairs of the roads within the same, and if, after such examination, it should appear to the said justices necessary or expedient for the purposes of any turnpike road so to do, to adjudge and order what portion, if any, of the rate or assessment levied or to be levied by virtue of The General Highway Act (5 & 6 *W. 4. c. 50.*) shall be paid by the parish surveyor to the said trustees or their

1861.

Trustees of
SUNK ISLAND
Turnpike
Road
v.
PATRINGTON.

1861.
 Trustees of
 SUNK ISLAND
 Turnpike
 Road
 v.
 PATRINGTON.

treasurer, such money to be wholly laid out in the actual repairs of such part of such turnpike road as lies within the parish from which it is received.

The clerk to the trustees produced the accounts of the turnpike trust for the past year, which shewed a deficit of 123*l.* 19*s.* 2*d.* It appeared from the statement of accounts produced that the entire length of this turnpike road is eight miles, four furlongs and fifty yards, of which there are in the parish of *Sunk Island* six miles and sixty-five yards; in the parish of *Patrington* three furlongs and twenty yards, and in the parish of *Ottringham* two miles and one hundred and eighty-five yards.

The surveyor of the turnpike road proved that the extent of the portion of the *Sunk Island* turnpike road which is in the parish of *Patrington* is in length three furlongs and twenty yards; that such portion of the road is in constant need of repair; that the funds of the turnpike trust are not sufficient for the repairs of the road; that the money stated in the accounts of the trustees to have been expended in labour and materials was expended in repairing and not in forming the road, and that the proportion of the expenses which ought to be contributed towards the repairs of the turnpike road from the parish of *Patrington* is 5*l.* 14*s.* 10*d.*

It was contended, on behalf of the surveyors of the highways of the parish of *Patrington*, that the *Sunk Island* Turnpike Act being a public general Act, authorizing the construction of quays, wharfs, landing places, warehouses, sheds and other buildings at *Stone Creek*, as well as the making of a turnpike road at *Sunk Island*, are not of the same character as the usual private Acts for making and maintaining turnpike roads; and that the trust

created thereby is not a public trust but a private arrangement of the Commissioners of Her Majesty's Woods, Forests and Land Revenues, and is not therefore such a turnpike trust as is entitled to contribution under the statute 4 & 5 *Vict. c. 59.*; and also that the *Sunk Island* Turnpike Act (15 & 16 *Vict. c. 45.*) having been passed since the passing of the 4 & 5 *Vict. c. 59.*, the last mentioned statute does not apply to this case.

1861.

 Trustees of
 SUNK ISLAND
 Turnpike
 Road
 v.
 PATRINGTON.

The justices being of opinion that the *Sunk Island* turnpike road is not such a road as is entitled to contribution under the statute 4 & 5 *Vict. c. 59.*, therefore refused the application of the trustees, and dismissed the case.

The questions for the opinion of this Court were,

Whether, under the circumstances above mentioned, the *Sunk Island* Turnpike Act (15 & 16 *Vict. c. 45.*) being a public general Act, and not a private Act, the trustees of this turnpike road are entitled to a contribution from the highway rates of the parish of *Patrington*, under the provisions of the statute 4 & 5 *Vict. c. 59.*; or whether the trust created by either of the said *Sunk Island* Turnpike Acts is such a public turnpike trust as is entitled to such contribution.

And whether the statute 4 & 5 *Vict. c. 59.* will apply at all in this case, that statute having been passed before the *Sunk Island* Turnpike Act (15 & 16 *Vict. c. 45.*).

P. M'Mahon, for the appellants.—As to the first question. (*Welsby*, who appeared for the respondents, intimated that he did not intend to argue it.)

Then as to the rest of the case. This is a public turnpike trust entitled to contribution from the highway rates under 4 & 5 *Vict. c. 59.* This appears from the

1861.
 Trustees of
 SUNK ISLAND
 Turnpike
 Road
 v.
 PATRINGTON.

preamble of the 15 & 16 *Vict. c. 45.*, which states that it would be for the benefit of the public if the powers conferred by that Act were created. It is true the trustees under the Act borrow money from the Commissioners of Woods and Forests, but that is the same thing as if they borrowed money in any other quarter. It is true also that a power to make quays and wharves is vested by the Act in the Commissioners of Woods and Forests; but that makes no difference, for the Legislature, in passing the 15 & 16 *Vict. c. 45.*, must be taken to have had the 4 & 5 *Vict. c. 59.* in their contemplation.

Welsby, *contra*.—This is not a public turnpike trust of the nature contended for. The object of the 4 & 5 *Vict. c. 59.*, was to create a provision in lieu of statute duty, which had been abolished by The General Highway Act, 5 & 6 *W. 4. c. 50.*; and, consequently, it cannot extend to any roads except such as, under the old law, would have had the benefit of statute duty. This appears from the preamble and context of the 4 & 5 *Vict. c. 59.*, and also from the language of Lord *Denman* C. J. and *Patteson* J. in *Regina v. White (a)*, which was decided on the similar statute 2 & 3 *Vict. c. 81.* The 15 & 16 *Vict. c. 45.* does not merely create a turnpike road, but a turnpike road and something more; for it empowers the Commissioners of Woods and Forests to make quays, wharves, &c.

P. M'Malon was not called on to reply.

COCKBURN C. J. Three questions arise in this case.

(a) 4 *Q. B.* 101.

The first of them—whether, the 15 & 16 *Vict. c. 45.* being a general Act, a turnpike road under it could be affected by the provisions of 4 & 5 *Vict. c. 59.*,—was abandoned in the course of the argument.

1861.

Trustees of
SUNK ISLAND
Turnpike
Road

v.

PATRINGTON.

The substantial questions for our consideration are, first, whether the fact that the fund out of which this road is to be maintained comes from quays, wharves, &c., as well as from the road itself, makes any difference, so as to take the case out of the provisions of stat. 4 & 5 *Vict. c. 59.*, supposing it falls within that statute in other respects. I think not. This is a road created under a statute passed for the purpose of making and maintaining a public road, which, for this purpose, gives power to erect toll houses and take tolls, and so far, therefore, is a turnpike road coming within the turnpike Acts, and consequently a road of benefit to the public. Any provision therefore in the Acts regulating turnpike roads ought to apply to such a case.

But then comes the remaining and more prominent objection that this is not a case within the 4 & 5 *Vict. c. 59.*, under which this application to the justices was made. Mr. *Welsby* says that that Act does not apply here because by that Act it was intended to effect a substitution of a part of the highway-rates for statute duty, as a subsidiary means of maintaining turnpike roads where the funds for them fail. He says that this Act of 15 & 16 *Vict. c. 45.* was passed after statute duty was abolished, and, as 4 & 5 *Vict. c. 59.* proceeds on the assumption that it had been abolished, and was directed to the case where then existing turnpike roads had not sufficient for their maintenance, the earlier Act cannot apply to cases within the more recent one.

1861.
 Trustees of
 SUNK ISLAND
 Turnpike
 Road
 v.
 PATRINGTON.

I cannot follow him to that conclusion. Both statutes were passed after stat. 5 & 6 W. 4. c. 40. had abolished statute duty. It is true that the preamble of the statute 4 & 5 Vict. c. 59. refers to existing roads, and speaks of the trust funds of some of those roads having been deficient in consequence of the absence of statute duty. Mr. *Welsby* says, from thence it appears that the statute only applies to those cases where repairs are capable of being supplied by statute duty. But I find that the enactment is in the most general terms, and directed, not only to turnpike roads in that position, but to all turnpike roads which afterwards might fall into it. And I can hardly suppose that the Legislature, in passing such an Act, based on the experience which they possessed that turnpike roads were sometimes brought into difficulties by failure of their funds, would take for granted that in future no such thing would ever arise. On the contrary, experience would point out that the same state of things might arise again, and therefore the Legislature were likely to make provision for both past and future cases.

Here therefore is a turnpike road, and the funds arising from its tolls, plus those from other quarters, are found deficient to keep the road in repair. The parish clearly lie under the common law liability to repair the road; in addition to which there is the statute, which declares that if the trust fund is deficient it shall be augmented out of the highway rate.

BLACKBURN J. (the only other Judge present.) The 4 & 5 Vict. c. 59. was passed with reference to the law as it then stood. A turnpike road is a highway, and

therefore, by common law, the parish were, and I apprehend still are, liable to repair this road, and liable to indictment if they neglect to do so. Statute duty had been imposed by several statutes, with remedies to enforce it; but, at the time of the passing of the statute in question, those statutes had been repealed, and those remedies were gone. It being then found that there were turnpike roads, being highways, the funds of which failed, and the public suffered in consequence of their being out of repair, that Act was passed. It is an enactment for the benefit of the public, which, inasmuch as turnpike trusts are apt to be insolvent, gives a new remedy by enabling the trustees to go before justices of the peace to obtain funds from the highway rate to keep them in repair.

This road is constituted under 15 & 16 *Vict. c. 45.*, which enables the trustees under it not only to make the road but to make a harbour; and, by sect. 17, the tolls from the road and the rates from the harbour are mixed into one fund. The first question asked us is whether, the 15 & 16 *Vict. c. 45.* being a public and not a private Act, the 4 & 5 *Vict. c. 59.* applies; but the point has been abandoned.

The next question is whether the trust under stat. 15 & 16 *Vict. c. 45.* is such as entitles this road to contribution from the highway rates. That turns on the point that this is not solely the trust of a turnpike road, but also of a harbour. I cannot see that that prevents this being a turnpike road; and the so holding is, I think, in accordance with the spirit as well as the language of the statute.

On the last question, I agree with my Lord Chief

1861.

Trustees of
SUNK ISLAND
Turnpike
Road
v.
PATRINGTON.

1861. Justice that the statute 4 & 5 *Vict. c. 59.* is not confined to turnpike trusts in existence at the time when it was passed.

Trustees of
SUNK ISLAND
Turnpike
Road
v.
PATRINGTON.

Order reversed, and remitted to the justices (a).

(a) There was a similar case against the parish of *Ottringham* referred to in the above, which was decided at the same time with the same result.

Thursday,
November 21st.

WRIGHT *against* GREENROYD.

Retrospective statute.
"Medical Act,"
21 & 22 *Vict.*
c. 90.

"The Medical Act," 21 & 22 *Vict. c. 90. s. 32.*, has not a retrospective effect, so as to prevent a person who is not registered under it from maintaining an action for medical or surgical advice given, or medicine supplied, before the Act came into operation.

THIS was an action by a surgeon and apothecary to recover the balance due upon his bill for attendance and medicine supplied, which was tried in a County Court, pursuant to the order of a Judge under 19 & 20 *Vict. c. 108. s. 26.*

At the trial it appeared that the attendance and medicine in respect of which the action was brought were given and supplied before "The Medical Act," 21 & 22 *Vict. c. 90.*, was passed ; and, as the plaintiff did not shew that he was registered under the provisions of that Act, he was nonsuited.

Maule having obtained a rule nisi to set aside the nonsuit,

Manisty shewed cause.—The question depends on the construction of certain sections of "The Medical Act," 21 & 22 *Vict. c. 90.*

Sect. 15. "Every person now possessed, and (subject to the provisions hereinafter contained) every person hereafter becoming possessed, of any one or more of the qualifications described in the Schedule (A) to this Act, shall, on payment of a fee not exceeding 2*l.*, in respect of qualifications obtained before the 1st *January* 1859, and not exceeding 5*l.* in respect of qualifications obtained on or after that day, be entitled to be registered on producing to the registrar of the branch council for *England, Scotland, or Ireland* the document conferring or evidencing the qualification or each of the qualifications in respect whereof he seeks to be so registered, or upon transmitting by post to such registrar information of his name and address, and evidence of the qualification or qualifications in respect whereof he seeks to be registered, and of the time or times at which the same was or were respectively obtained: Provided always, that it shall be lawful for the several colleges and other bodies mentioned in the said Schedule (A) to transmit from time to time to the said registrar lists certified under their respective seals of the several persons who, in respect of qualifications granted by such colleges and bodies respectively, are for the time being entitled to be registered under this Act, stating the respective qualifications and places of residence of such persons; and it shall be lawful for the registrar thereupon, and upon payment of such fee as aforesaid in respect of each person to be registered, to enter in the register the persons mentioned in such lists, with their qualifications and places of residence as therein dated, without other application in relation thereto."

Sect. 27. "The registrar of the general council shall in every year cause to be printed, published, and sold,

1861.

WRIGHT
V.
GREENHOYD.

1861.

WRIGHT
v.
GREENHOYD.

under the direction of such council, a correct register of the names in alphabetical order according to the surnames, with the respective residences, in the form set forth in Schedule (D) to this Act, or to the like effect, and medical titles, diplomas, and qualifications conferred by any corporation, or university, or by doctorate of the Archbishop of *Canterbury*, with the dates thereof, of all persons appearing on the general register as existing on the 1st *January* in every year; and such register shall be called 'The Medical Register;' and a copy of the Medical Register for the time being, purporting to be so printed and published as aforesaid, shall be evidence in all courts and before all justices of the peace and others that the persons therein specified are registered according to the provisions of this Act; and the absence of the name of any person from such copy shall be evidence, until the contrary be made to appear, that such person is not registered according to the provisions of this Act: Provided always, that in the case of any person whose name does not appear in such copy, a certified copy, under the hand of the registrar of the general council or of any branch council, of the entry of the name of such person on the general or local register shall be evidence that such person is registered under the provisions of this Act."

Sect. 31. "Every person registered under this Act shall be entitled according to his qualification or qualifications to practice medicine or surgery, or medicine and surgery, as the case may be, in any part of Her Majesty's dominions, and to demand and recover in any Court of law, with full costs of suit, reasonable charges for professional aid, advice, and visits, and the cost of any medicines or other medical or surgical appliances

rendered or supplied by him to his patients: provided always, that it shall be lawful for any college of physicians to pass a bye-law to the effect that no one of their fellows or members shall be entitled to sue in manner aforesaid in any Court of law, and thereupon such bye-law may be pleaded in bar to any action for the purposes aforesaid commenced by any fellow or member of such college."

1861.

WRIGHT
v.
GREENROLD.

Sect. 32. "After the 1st *January*, 1859, no person shall be entitled to recover any charge in any Court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under this Act."

These sections shew that the plaintiff was bound, as a condition precedent to recovering, to prove that he was registered under this Act. [*Cockburn C. J.* Suppose a medical man had retired from practice before the statute came into operation, and afterwards sought to recover a bill due to him, you must contend that he could not maintain his action because his name is not on the register. The statute was only meant to act prospectively. *Blackburn J.* Suppose a cause like the present stood for trial the day before the Act came into operation, the plaintiff would at that moment be entitled to recover. If the trial were postponed until after it came into operation, then, if your argument is right, he must either be nonsuited or produce the register with his name in it.] The intention of the legislature was that no person practising medicine or surgery should be allowed to sue for his fees unless he is registered. [*Cockburn C. J.* No; it was to make every medical person register,

1861.

 WRIGHT
 v.
 GREENHOYD.

and, to secure that, it has enacted that he shall not be allowed to recover his charges unless he does. But at the time the plaintiff did the work and supplied the medicines here sued for, there was no obligation on him by law to register. It would require the strongest words in the statute to induce us to hold that it extends to such a case. *Blackburn J.* I have heard Lord *Wensleydale* cite, with approbation, the maxim "Nova constitutio futuris formam imponere debet, non præteritis" (a). I think it clear, from the language of the 32d section of this Act, that the prohibition that "after the 1st *January* 1859 no person shall be entitled to recover any charge &c." refers to a charge incurred after 1st *January* 1859.]

Maule, who appeared to support the rule, said that the point had been already decided in the Exchequer in a case of *Thistleton v. Frewer* (b).

PER CURIAM. (Consisting of COCKBURN C. J., WIGHTMAN and BLACKBURN JJ.)

Rule absolute.

(a) The learned Judge probably refers to *Moon v. Durdan*, 2 *Exch.* 22. 42, where *Parke B.* cites the maxim in question.

(b) Since reported, 31 *L. J. Exch.* 230.

1861.

The QUEEN *against* The Churchwardens, Overseers and Guardians of the Poor of the Parish of BIRMINGHAM.

Saturday,
November 16th.

*Evidence.
Hearsay.
Declaration
of deceased
person.*

On an appeal against an order of removal of a female pauper, it was shewn that the father of the pauper's husband had occupied and paid rent for a tenement in the appellant parish. In order to prove the amount of that rent, the respondents' counsel offered to shew that, whilst in occupation of that tenement, the father said to his son that he occupied the same as tenant at an annual rent of 20*l.*: held, that the evidence was admissible.

TWO justices of the peace for the borough of *Birmingham* made an order, dated 9th *August*, 1860, for the removal of *Sarah*, wife of *William Day*, absent from her, and their four children, from the parish of *Birmingham* to the parish of *Kingswood*, in the county of *Gloucester*; against this order the parish of *Kingswood* appealed to the Quarter Sessions for the borough of *Birmingham*, which quashed the order, subject to the following case.

The respondents proved that *John Lockyer Day*, deceased, father of *William Day*, occupied a tenement from the year 1829 until his death in 1847, in the parish of *Kingswood*, and the rent for which was settled in account with the landlords, and was found by the Court to have been paid by *John Lockyer Day*. To prove the amount of that rent, evidence was tendered by the respondents and objected to by the appellants' counsel, that *John Lockyer Day*, whilst in occupation of that tenement, said to his son *Thomas Day* that he, *John Lockyer Day*, occupied the same as tenant at a rent of 20*l.* per year.

If this Court should be of opinion that the evidence of the declaration of *John Lockyer Day* was admissible

1861. for the purpose of proving the amount of the rent, and the nature of the occupation, then the order of Quarter Sessions was to be quashed, and the order of removal confirmed; otherwise the order of Quarter Sessions was to be confirmed, and the order of removal quashed.

The QUEEN
v.
Overseers of
BIRMINGHAM.

O'Brien and *Cockle*, in support of the order of Quarter Sessions.—Occupation and payment of rent by the deceased having been proved, the amount of the rent paid by him became material, for, if it reached a certain amount, it would confer a settlement. The question, therefore, is whether his declaration is admissible evidence to prove that amount. This is clearly hearsay, and does not fall within any of the recognised exceptions to the rule rejecting that kind of evidence. The other side will probably seek to place it on the ground of a declaration by an occupier in possession. The principle on which the admissibility of such evidence rests is that, occupation being *prima facie* evidence of ownership in fee simple, whatever is stated by the party in occupation tending to cut down his interest is receivable: 1 *Stark. Ev.* 353, 365-6, 3d ed., *Holloway v. Rakes*, cited in *Davies v. Pierce* (a), *Peaceable d. Uncle v. Watson* (b), *Walker v. Broadstock* (c), *Doe d. Hindly v. Rickarby* (d), *Doe d. Baggalley v. Jones* (e). [*Cockburn C. J. Walker v. Broadstock* (c) has been overruled (f).] But, although that kind of evidence is admissible to prove the fact of tenancy, it is not admissible to prove collateral facts; such as the amount of rent, as here, or the terms of a contract, as in *Reg. v. The Inhabitants of Worth* (g). Such

(a) 2 T. R. 53.

(b) 4 Taunt. 16.

(c) 1 Esp. 458.

(d) 5 Esp. 4.

(e) 1 Campb. 367.

(f) See *Papendick v. Bridgwater*, 5 E. & B. 166. 169. 178. 179. 181.

(g) 4 Q. B. 132.

evidence as this is open to all the characteristic dangers of hearsay; and the law is the same with respect to entries made by deceased persons in the ordinary course of business: *Chambers v. Bernasconi* (a). In *Taylor on Evidence*, p. 544, 2d ed., where the cases on the subject of declarations against proprietary interest are collected, the author says, "It is difficult to fix with precision how far these declarations are admissible as evidence of the facts contained in them * * * but, in strictness, it would seem that they ought to be confined to the simple proof of the interest which the declarant enjoyed in the premises." Besides, the statement here may be as much *for* as *against* the interest of the deceased, for it tends to prove that he had a tenancy from year to year in the premises. If the statement of a party, as to the amount of rent, is receivable, so also should be his statement that he had paid it on such a day. As regards admissibility, there is, perhaps, no difference between verbal and written statements of this nature, but the former are more liable to contain collateral matter, which it is difficult to separate from what is relevant. *Davies v. Pierce* (b) and *Roe d. Brune v. Rawlings* (c) will be relied on by the other side; but, in the former, the declarations were accompanied by acts; and, in the latter, the owner of the estate had accredited the document by keeping it among his muniments of title; and that case is so explained by *Coleridge J.* in *Papendick v. Bridgwater* (d). [*Cockburn C. J.* This case seems to come within the principle of another class of cases. I mean those in which declarations against pecuniary interest have been held admissible. The principal of these

1861.

The QUEEN
v.
Overseers of
BIRMINGHAM.

(a) 1 C. M. & R. 347.

(b) 2 T. R. 53.

(c) 7 East, 279.

(d) 5 E. & B. 166. 176.

1861. *is Higham v. Ridgway (a)*, where an entry of the delivery of a woman, made in his books by an accoucheur, was held admissible to prove not only the fact but the time of the delivery.] The principle of that case has been followed in *Doe, Lessee of Reece, v. Robson (b)* and *Davies v. Humphreys (c)*, but it is very questionable, and ought not to be extended. In *Davies v. Humphreys (c)* Parke B. says, p. 166: "That the receipt was evidence of the fact of the payment which it admitted, in every case in which the proof of payment would be relevant, was not disputed; but it was denied that the whole entry would be admissible to shew that the 300*l.* was advanced to *Evan Humphreys*: and certainly if this point were now, for the first time, to be decided, it would seem more reasonable to hold that the memorandum of a receipt of payment was admissible only to the extent of proving that a payment had been made, and the account on which it had been made." And, in *Doe d. Kinglake v. Beviss (d)*, *Williams J.* uses language to the same effect. The distinction between declarations against pecuniary and proprietary interest is, that the former are admissible if made at any time, but, in order to render the latter admissible, the party must be in possession. [*Blackburn J.* referred to *The Baron Bode's Case (e)*.] The declaration there was not a statement of the terms of a tenancy, but simply that the person did not hold the land for himself. [*Cockburn C. J.* What do you say to *Mountnoy v. Collier (f)*?] The amount of rent was not the question there. [*Cockburn C. J.* I have seen many cases where

(a) 10 *East*, 109.(c) 6 *M. & W.* 153.(e) 8 *Q. B.* 208.(b) 15 *East*, 32.(d) 7 *C. B.* 456, 514.(f) 1 *E. & B.* 630.

facts have been proved by written entries against interest, of the truth of which no one could entertain a doubt, and justice would have been defeated if they had not been received. A Judge can always tell a jury that anything extraneous in such statements may be disregarded. People were formerly frightened out of their wits about admitting evidence, lest juries should go wrong. In modern times we admit the evidence, and discuss its weight. If a man says, "I pay 20*l.* a year rent," there is no more reason to doubt that he is telling the truth than when he says he is paying rent at all.]

1861.

THE QUEEN
v.
OVERSEERS OF
BIRMINGHAM.

I. Spooner and Manley Smith, contra. Statements made by a person which are adverse to his interest are admissible in evidence, whether the statement were made directly or collaterally; *Strode v. Winchester* (a), *Middleton v. Melton* (b), *Stanley v. White* (c), *Gleadow v. Atkin* (d), *Carne v. Nicoll* (e), *Percival v. Nanson* (f). In *Doe d. Welsh v. Langfield* (g), *Parke B.* says, p. 514: "All statements made by a deceased person while in possession of property are in themselves original evidence, if they go to cut down his interest in it." And there is no difference in this respect between declarations against pecuniary and against proprietary interest; *Sussex Peerage Case* (h), per Lord Campbell. [*Blackburn J.* How do you know that this declaration was not made by the deceased with the view of *decreasing* his rent? It is not necessarily against his interest, for the rent might have been 30*l.* instead of 20*l.*] Fraud is never presumed:

(a) 1 *Dick.* 397.(c) 14 *East*, 332.(e) 1 *Bing. N. C.* 430.(g) 16 *M. & W.* 497.(b) 10 *B. & C.* 317.(d) 1 *C. & M.* 410.(f) 7 *Erch.* 1.(h) 11 *Cl. & F.* 85. 113.

1861. besides which, the effect of the declaration is to charge
 The QUEEN him with the payment of 20*l.* a year. Moreover, the
 v. statement of the amount of rent is not a collateral fact;
 Overseers of and, even if it were, it is admissible on the principle
 BIRMINGHAM. that it is part of a declaration which is admissible;
Higham v. Ridgway (a).

COCKBURN C. J. I am of opinion that this evidence ought to have been received. It is well established that a declaration made by a person in occupation of real estate that he holds as tenant, is admissible after his decease to rebut the presumption of law, arising from the fact of occupation, that he was owner in fee simple. The question here is, whether, if a person, at the time he admits that he is not the owner in fee, but is only tenant of the property, states also the amount of rent which he pays for it, that declaration is admissible, not merely to shew that his occupation is an occupation as tenant, as distinguished from that as owner, but to shew what in fact was the amount of rent which he paid as tenant.

Now, it has been held, over and over again, in the analogous case of declarations against *pecuniary* interest, that the declaration of the deceased person may be received not only to prove so much contained in it as is adverse to his pecuniary interest, but to prove collateral facts stated in it; at all events, so far as relates to facts which are not foreign to the declaration, and may be taken to have formed a substantial part of it. That being settled, I cannot see in principle any reason why the same effect should not be given to declarations against *proprietary* as to declarations against *pecuniary* interest. It is true that in this case the declaration was

(a) 10 *East*, 109.

oral, and it has been pressed upon us that a declaration of that kind does not stand on the same footing as an entry made in the course of business, which was the evidence in *Higham v. Ridgway* (a). And I quite admit that, as regards the *effect* of the evidence, there is a great difference between them ; but that goes rather to the weight, than the admissibility, of the evidence. I am disposed to hold that there is no distinction in principle between written and oral declarations if the other element of admissibility is present, i. e., that the declaration was against pecuniary or proprietary interest ; and either is admissible to prove what are, not very properly, called collateral facts. If, in *Higham v. Ridgway*, instead of an entry, a verbal statement of the same fact had been offered in evidence, the same consequence would have followed.

The immediate point under consideration has never come before any of the Courts. *Roe d. Brune v. Rawlings* (b) is not exactly this case. There, the written statement of a tenant for life, as to the amount of the antient rent reserved, was offered in evidence ; and the cases are, therefore, so far alike as being questions of the amount of rent. But the distinction between them is, that there what was offered in evidence against a lessee of land was an entry in the muniments of a settled estate of the amount of that rent. A tenant for life had a power of leasing at a certain amount of reserved rent, and he entered that amount in a paper ; and Lord *Ellenborough* said the entry was against his interest, because it was his interest to lower the amount. But the case of *Peaceable d. Uncle v. Watson* (c) is much more like the present,

1861.

The QUEEN
v.
Overseers of
BIRMINGHAM.

(a) 10 *East*, 109.(b) 7 *East*, 279.(c) 4 *Taunt.* 16.

1861.

THE QUEEN
v.
Overseers of
BIRMINGHAM.

and I think the principle of it is applicable here. There the question was asked of a witness whether the tenant of certain premises had not stated, not only that he did not occupy them as owner, but under whom he occupied; and in an action to recover the premises, brought between strangers, the declaration of the tenant was held admissible to establish both those facts. According to the argument of the respondents' counsel, all that was admissible was the fact of his being a tenant; but that, when he went on and said, "As tenant to *A. B.*," he stated more than was admissible. That circumstance is just as much a collateral fact as the amount of rent in this case.

So far, therefore, as authority goes, it is in favour of the appellants. But, independently of that, I should be prepared to say, that as soon as it is established, which it now is, on the authority of *Higham v. Ridgway* (a) and the other cases, that you may receive the declaration of a deceased person, as shewing, not only something adverse to his interest, but all incidental facts contained in that declaration, so far as they are not foreign to it, it follows as a consequence that those collateral facts may be proved by the declaration; and that principle applies to the case before us.

BLACKBURN J. (the only other Judge present). I am of the same opinion. It is now settled that a statement against interest by a deceased person is, with certain limitations, admissible evidence in proceedings between strangers. There are numerous cases which shew that where a person is in possession of real property, which possession is *primâ facie* evidence of a tenancy in fee, any statement

(a) 10 *East*, 109.

1861.

The QUEEN
v.
Overseers of
BIRMINGHAM.

that he makes to cut down that interest is admissible in evidence after his decease, as being a statement against his interest. In almost all the cases the question has arisen, not as to the amount of rent, but whether the party was entitled to property. And the reason why such evidence is admissible is stated in distinct terms in *The Baron Bode's Case* (a); where a declaration of the deceased father of the claimant, who had been in possession of the property, that he only occupied and managed it for his son, was held by this Court, on a trial at bar, admissible, as being against the interest of the person making it. Then is such a statement admissible to the same extent and for the same purposes as where the effect of the statement is to charge the person with the receipt of money? I neither find any such distinction taken between them in any of the cases, nor can I, in principle, see any. The probability that a man would speak truth (which is the reason assigned for admitting the evidence) is equally great whether the tendency of the declaration is to establish liability for money or to deprive a man of real estate.

Then comes the other part of the question. This declaration being against the interest of the person as shewing that he was not tenant in fee, is that part of it where he says "I am tenant at a rent of 20*l.* a year," not admissible also? The Court could not admit one part without hearing the whole: and it cannot be disputed, on numerous authorities from *Higham v. Ridgway* (b) downwards, that, if a person, in his declaration, admits the receipt of a sum of money, and a statement of something else is connected with that admission, the whole of the statement becomes evidence.

(a) 8 Q. B. 208. 244.

(b) 10 East, 109.

1861.

The QUEEN
v.
Overseers of
BIRMINGHAM.

Lastly, is there any distinction in this respect between a written entry and an entry proved by parol? I can see a great difference between them in weight; for a parol statement has, in many cases, no weight at all. But when the fact of a parol statement having been made is satisfactorily proved, I cannot see any distinction, as regards admissibility, between it and a written one, and no such distinction is taken in the cases. In the present instance, if the parol declaration were admissible at all, it was satisfactory evidence.

Order of Sessions quashed.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN

MICHAELMAS VACATION,

XXV. VICTORIA.

OGDEN *against* GRAHAM and another.Wednesday,
November 27th.

The defendants chartered a ship to proceed from *England* to a safe port in *Chili*, with leave to call at *Valparaiso*. On her arrival at *Valparaiso*, the charterers' agent named the port of *Carrisal Bajo* as the port of discharge, and directed the master to proceed thither. At the time *Carrisal Bajo* was named as the port of discharge, that port was closed by order of the *Chilian* government, and the ship could not proceed thither without confiscation. The ship was consequently detained for some time at *Valparaiso*, and, on the port being opened, sailed for *Carrisal Bajo* and there discharged her cargo. Held, that the charterers were liable in damages to the shipowner for the detention of the ship at *Valparaiso*, as they had not named a "safe port" within the meaning of the charter-party.

Charter-party.
Expression
"safe port."

THIS was a special case, stated without pleadings.

The plaintiff is the owner of the barque *Respigadera*. The defendants carry on business as merchants at *Liverpool*, under the name of *Graham, Kelly & Co.* On the 25th *October*, 1850, they entered into a charter party as follows:—" *Liverpool*, 25th *October*, 1858. It is this day mutually agreed between *W. H. Ogden*, owner of the ship *Respigadera*, and *Graham, Kelly & Co.*, of *Liverpool*, merchants and freighters, that the ship being tight, staunch and strong, and every

1861.

OGDEN

V.
GRAHAM.

way fitted for the voyage, shall, with all convenient speed, sail and proceed to *Swansea*, or so near thereto as she may safely get, and there receive from the factors or agents of the said merchants a full and complete cargo of iron and coal or other lawful merchandize, and being so loaded shall therewith proceed (wind and weather permitting) to a safe port in *Chili* (with leave to call at *Valparaiso*), or so near thereunto as she may safely get, and deliver the same, on being paid freight, at the rate of 40s. per ton of 20 cwt. Cargo to be taken from alongside the ship at consignees' risk and expense. (The act of God, or the Queen's enemies, restraints of princes and rulers, fire and all and every other dangers and accidents of the seas, rivers and navigation of whatever nature and kind soever during the said voyage, excepted.) Payment to be made as follows: One third by the charterers' acceptance at three months from the date of sailing, or in cash equal thereto, at charterers' option. The balance in cash on the true delivery of the cargo. Twenty working days are to be allowed the said merchant (if the ship be not sooner despatched) for loading the said ship at *Swansea*, and twenty-five working days for discharging, to commence from notice being given of the vessel being ready to deliver, and ten days on demurrage over and above the said laying days, at 7*l.* per day. The vessel to be consigned to Messrs. *Graham, Rowe & Co., Valparaiso*, inwards and outwards, and their agents at port of discharge.

(Signed) "*W. H. Ogden*,"*Graham, Kelly & Co.*

" Master to sign bills of lading without prejudice to this charter.

"*W. H. O.,*"*G., K. & Co.*"

The vessel went to *Swansea*, and there loaded a cargo of iron and coal. At *Swansea* the master signed bills of lading made out by the defendants, of which the following is a copy.

1861.

 OGDEN
v.
GRAHAM.

"Shipped in good order and condition by *Graham, Kelly & Co.*, of *Liverpool*, in and upon the good ship or vessel called *Respigadera*, whereof *T. H. Fearon* is master for the present voyage, and now lying in the port of *Swansea*, and bound for *Valparaiso*, for orders, twenty thousand iron bars, being marked and numbered as per margin, and to be delivered in like good order and condition at the aforesaid port of discharge in *Chili* (all and every the dangers and accidents of the seas and navigation of whatsoever nature or kind excepted) unto ———, or order, or their assigns. Freight for the said goods to be paid as per margin, one third in three months, and the balance in cash on the true delivery of the goods. Dated this 9th day *December*, 1858.

"*Thos. H. Fearon.*"

There was a bill of lading in precisely similar terms for coals.

The vessel proceeded to *Valparaiso* for orders by direction of the defendants. She arrived at *Valparaiso* on the 2d *April*, 1850, and, on the 4th *April*, *T. H. Fearon*, the master, gave *Graham, Rowe & Co.*, the agents of the charterers, the following notice:—"The barque *Respigadera* being bound to this place for orders for her port of discharge, and you, being the consignee, are bound to give me this order (this being the seat of business of the country) immediately, forty-eight hours of my arrival having expired, I beg you to give me the same, in failure of which I now inform you at noon this day my lay days will commence and go on from this

1861.

 OGDEN
 v.
 GRAHAM.

date." To this communication *Graham, Rowe & Co.* gave an answer as follows:—"In reply to your communication, we have to request you, as soon as the Custom House authorities will permit, to proceed to the port of *Carrisal Bajo*, where you will deliver your present cargo, consigning yourself to Mr. *William Walker*, of *Bollevaer*, who will attend to ship's business. We enclose a letter for Mr. *Walker*, as also one for Don *Guillerino Sutelan*, the party to receive the coal, and which you will please deliver on arrival." To this letter the master replied:—"In reply to your communication of the 5th, ordering me to a closed port, I beg to inform you that, having ordered an impossibility, I must place the vessel at lay days at this place, of which you will consider this a sufficient notice, and that lay days will go on from the 5th, the day of your order to proceed." Subsequently *Graham, Rowe & Co.* wrote to the master, stating that, as they had given him instructions, on his arrival at *Valparaiso*, to proceed to *Carrisal Bajo*, they did not consider themselves responsible for the detention, which was caused by circumstances over which neither they nor the master had any control, viz., by the refusal by the authorities of the country to allow him to proceed by granting the required clearance.

The port of *Carrisal Bajo* is in the mining district of *Chili*. It is one of the minor ports in *Chili*, and no vessel can proceed there, even under ordinary circumstances, without calling at *Valparaiso*, or at some other of the major ports (of which there are several in the mining districts) for a permit or license to discharge her cargo.

At the time the charter-party was made both the owner and the charterers were in ignorance of the fact

of any port in *Chili* being closed by the government of that country; but when the vessel arrived at *Valparaiso* *Graham, Rowe & Co.* knew that the port of *Carrisal Bajo*, as well as all other ports in the mining districts, both major and minor ports, had been declared closed by the Chilian government; and both they and the master of the vessel knew that all vessels unloading there without a permit would be liable to confiscation, and neither the master nor *Graham, Rowe & Co.* had any knowledge as to when a permit would be given. The port of *Carrisal Bajo* had been declared closed by the Chilian government itself, because the district in which it was situated was in a state of rebellion; but, except for this rebellion and the interdict of the government, it was, by nature, a safe port. When the rebellion was suppressed the government removed the interdict, and gave the master a permit, and he went and discharged his cargo at *Carrisal Bajo*. The vessel lay at *Valparaiso* thirty-eight days. The order to the master to discharge the cargo at *Carrisal Bajo* was *bonâ fide*, as the cargo was intended by the charterers for discharge at that port. *Graham, Rowe & Co.* also acted as consignees of the ship at *Valparaiso* in terms of the charter, and charged the owners a commission for doing so. The permit for the ship was procured as soon as it was possible, according to the usual custom in such cases, namely, that the consignee of the ship procures it as agent of the ship-owner. At the time the vessel arrived at *Valparaiso*, and during all the time she remained there, *Valparaiso* itself and other safe ports, all, however, at a long distance from the district in rebellion, were open, at which the vessel might have been discharged.

The question for the opinion of the Court was,

VOL. I.

3 F

B. & S.

1861.

OGDEN
v.
GRAHAM.

1861.

 OGDEN
 v.
 GRAHAM.

Whether the plaintiff can maintain any action against the defendants on account of the detention of the *Respigadera* at *Valparaiso*, under the circumstances above mentioned.

If the Court were of opinion that he could, judgment was to be entered for the plaintiff for an amount of damages, to be settled by arbitration, with costs.

If the Court were of opinion that he could not, judgment was to be entered for the defendants, with costs.

Mellish, for the plaintiff.—The point to be argued is, whether at the time the order was given to the master to proceed to *Carrisal Bajo* that place was a safe port within the meaning of the charter-party. The case states that at that time the master could not take his ship into *Carrisal Bajo* without confiscation. Was he then bound to go there? Clearly not. The charterers have not complied with the terms of the charter-party in ordering the ship to a closed port. Port, both in legal and mercantile language, means a place into which the master can take his ship. No particular meaning can be attached to the word “safe.” The word port implies “safe port.” The maxim “*Expressio eorum quæ tacite insunt nihil operatur*” applies.

The Court then called on

Milward, for the defendants.—The word “safe” in the charter-party means a port safe so far as regards the incidents of navigation. As soon, therefore, as the charterers have named a port into which it is physically possible for the master to take the ship they have fulfilled their part of the contract. It was the duty of the ship-owner to obtain the permit from the Custom House authorities, and the charterers are not to suffer

because the master is not able to comply with the Custom House regulations in force at *Valparaiso*; *Spence v. Chodwick* (a); such come within the exception in the charter-party of "restraints of princes and rulers."

1861.

OGDEN
v.
GRAHAM.

Mellish was not heard in reply.

WIGHTMAN J. The question in this case is whether the charterers have done all they were bound to do under this charter-party, or whether they are liable to pay damages that have arisen in consequence of their not sending the vessel to a safe port in *Chili* according to the terms of the charter-party.

The charter-party states that the ship shall forthwith proceed (wind and weather permitting) to a safe port in *Chili* (with leave to call at *Valparaiso*), or so near thereunto as she may safely get, and deliver the cargo, on freight being paid for the same. *Carrisal Bajo* was a port in *Chili*, safe so far as the ordinary incidents of ports are concerned, but a port into which the master could not take the ship without confiscation, unless he or the charterers could obtain a permit from the Government for the time being for her to enter. Neither the master nor the charterers were able to obtain such an order, and therefore the vessel, unless she ran the risk of confiscation, could not enter that port. The charterers named the port of *Carrisal Bajo* as the port to which the ship was to be taken. Was such a port safe within the meaning of the charter-party? Did it come within the terms of a safe port in *Chili*? I do not know what force can be given to the word "safe" when added to the word "port." As *Carrisal Bajo* was a port

(a) 10 Q. B. 517.

1861.

OGDEN
v.
GRAHAM.

into which the vessel could not enter without confiscation, it seems to me clearly not within the terms contemplated by the parties. It may be that the charterers were perfectly innocent on this occasion as regards any knowledge of the danger that might be incurred by the vessel, but at the same time here is a contract that she is to go into a safe port in *Chili*, which the charterers shall name. The contention on behalf of the charterers is, that when they named that port, and it was safe in the sense of navigation, they had done all that was necessary, and that, although the vessel could not go to *Carrisal Bajo* without being confiscated the moment she arrived there, that port was a safe port within the meaning of the charter-party. I think that would be an unreasonable construction, and the charterers must pay the damage occasioned by the breach of contract in not naming a safe port, to which they have made themselves liable by the specific terms of the contract.

BLACKBURN J. (the only other Judge present.) I am of the same opinion. By the charter-party it is agreed that the vessel shall sail for a safe port in *Chili*, with leave to call at *Valparaiso*, and although it is not in terms so stated, it follows by necessary implication that the charterers are to name a safe port to the shipowner, who will then be able to earn his freight by proceeding thither. It appears, from the facts stated in the case, that this was a perfectly honest and bona fide transaction, and we must take it that the charterers had really sent out to their agent at *Valparaiso* instructions for the vessel to go to this particular port in *Chili*, and to deliver the cargo there. It however so hap-

pened that, before *Carrisal Bajo* was named to the ship-owner or the master, that port was closed, not merely by the Custom House regulations as put by Mr. *Milward*, but by the Government of the country. At that time there was a rebellion in some of the provinces of *Chili*, and an order was issued by the Government prohibiting, under pain of confiscation, any ship from entering certain ports, of which *Carrisal Bajo* was one, without a license of the Government, and the Government at that time refused to grant any such license. The charterers then honestly named this place as the one into which the ship-owner was to take his ship; and the question is, have they complied with the stipulation in the charter-party which requires them to name a safe port in *Chili* to which the ship is to go and there earn her freight? Now, in the absence of all authority, I think that, on the construction of this charter-party, the charterers are bound to name a port which, at the time they name it, is in such a condition that the master can *safely* take his ship into it: but, if a certain port be in such a state that, although the ship can readily enough, so far as natural causes are concerned, sail into it, yet, by reason of political or other causes, she cannot enter it without being confiscated by the Government of the place, that is not a safe port within the meaning of the charter-party. If the charterers had named a port, and subsequent events had prevented the ship from entering it, then I agree with Mr. *Milward* that the ship-owner might avail himself of the clause of exception, as to the restraints of princes and rulers, to save him from going into that port, but it would not entitle him to recover his freight. As it appears here the matter happened before the charterers named the port. They were to name

1861.

OGDEN
V.
GRAHAM.

1861.

 OGDEN
 v.
 GRAHAM.

a port which was to be safe at the time they named it. They named a port which had been a safe port, and would probably thereafter become a safe port; but if, at the time they named it, it was a port into which the ship-owner could not take his ship and earn his freight, it seems to me that they have not complied with the conditions in the charter-party that they should name a safe port. That being so, they are liable for damages for not naming a safe port within a reasonable time, and the measure of damages will be regulated by the detention of the ship at *Valparaiso* beyond that time.

Such being my view of the case, I agree with my brother *Wightman* that the plaintiff is entitled to judgment.

Judgment for the plaintiff (a).

(a) Reported by *H. Holroyd Esq.*

Tuesday,
November 26th.

BRAUNSTEIN *against* The ACCIDENTAL DEATH Insurance Company.

Policy of insurance.
Reasonable condition.
Condition precedent.

1. A policy of insurance was entered into with a Company against bodily injury from any railway accident directly affecting the assured while travelling on any line of railway in *Great Britain* or *Ireland* by a passengers train propelled by steam power. One of the conditions in the deed of settlement of the Company, which by the terms of the policy was incorporated with it, provided that, before payment of the sum insured by any policy, proof satisfactory to the directors of the Company should be furnished by the claimant of the death or accident, together with such further evidence or information, if any, as the directors should think necessary to establish the claim: held, that this must be understood to mean such evidence or information as the directors might reasonably, and not such as they might unreasonably and capriciously require.

2. There was a condition indorsed on the same policy, that, in case of difference of opinion as to the amount of compensation payable in any case, the question should be referred to the arbitration of a person to be named by the secretary for the time being of the Master of the Rolls, and all expences and costs should be subject to the decision of such arbitrator, and the award made on such arbitration was to be taken as a final settlement of the question, and might be made a rule of Court: held, that a reference to arbitration in the manner prescribed was rendered a condition precedent to bringing an action for an injury within the policy.

1861.

BRAUNSTEIN
v.
ACCIDENTAL
DEATH
Insurance
Company.

THE declaration alleged that the defendants made and entered into a certain policy or contract of insurance with the plaintiff, whereby, after reciting that the plaintiff had delivered into the office of the defendants a declaration in writing, signed by or on behalf of him, the plaintiff, and had agreed that such declaration should be the basis and condition of the contract for the insurance by the said policy intended to be made, and that the plaintiff had paid to the defendants the sum of 2*l.* 2*s.*, as the premium for the said insurance: IT WAS WITNESSED AND DECLARED by the defendants that, if the plaintiff should, while travelling on any line of railway in *Great Britain* or *Ireland*, by a passengers train propelled by steam power, receive or suffer any bodily injury from any railway accident directly affecting himself, then subject as therein or in the indorsement thereon was mentioned or referred to, the subscribed capital and other funds and property of the said Company should according to the provisions of the deed of settlement of the Company and subject as aforesaid, be liable to make or pay to the plaintiff, his executors, administrators or assigns at such time or times as after mentioned, the following payment or compensation; that is to say, in case such accident should cause the death of the plaintiff within three calendar months after the occurrence thereof the full sum of 1000*l.*, such sum to be payable to the personal representatives or assigns of the plaintiff within one calendar month after proof, satisfactory to the directors, should have been furnished of the death of the plaintiff, in manner entitling them to receive the said sum under or by virtue of that policy; and in case such accident

1861.

BRAUNSTEIN
v.
ACCIDENTAL
DEATH
Insurance
Company.

should not cause the immediate death of the plaintiff, but should cause any bodily injury to the plaintiff of a serious nature, such sum, by way of compensation, as should appear just and reasonable, and in proportion to the injury received, such sum to be ascertained, in case of difference or dispute, in manner provided by the stipulations and conditions indorsed thereon. Provided also, that the policy was effected upon the express condition, that if any statement or allegation contained in the aforesaid declaration should be untrue, or if in any claim for payment of money to be thereafter brought by virtue of that policy, or in the statement made in support of such claim, or in the information given to the said Company in respect thereof, any false or fraudulent representation should be contained, or if the insurance thereby made should have been obtained through any misrepresentation, concealment, or untrue averment whatsoever, then that the policy should be void and all moneys paid in respect thereof should be forfeited to the Company. Provided also, and it was thereby expressly agreed and declared that no claim should be payable by the defendants under that policy in the case of non-fatal injury, unless the same should begin to take effect, or should be experienced, within the space of one calendar month after the happening of such accident. Provided also, that in the event of any sum of money being paid by the defendants to the plaintiff, under or by virtue of that policy, by way of compensation for any personal injury sustained by him (whether the same should result in loss of life or not), the policy should be treated and considered as a valid and subsisting policy to the extent only of the residue or balance of the sum of 1000*l.* which should remain after deducting there-

from the amount of the compensation paid, it being an express condition of the policy, that the Company should not under any circumstances be liable to pay to the plaintiff or his personal representatives a larger amount either in one sum or in the aggregate than 1000*l*. Provided also, that notice in writing of any claim to be made against the Company, on account of any non-fatal accident, should be given to the Company within one calendar month after the occurrence thereof, and notice of the death of the plaintiff by any such accident as aforesaid should be given within two calendar months after such death should occur. Provided also, that the policy and the insurance thereby made should be subject to the several regulations and conditions printed on the back thereof, so far as they might be respectively applicable, in the same manner as if such regulations and conditions were repeated and incorporated in the policy with reference to the plaintiff. It then alleged that the last mentioned regulations and conditions were as follows: First. The subscribed capital and other funds and property of the Company which, for the time being, should remain unapplied and undisposed of, and not applicable to prior claims and demands in pursuance of the trusts, powers and authorities of the deed of settlement, should alone be liable to make good and satisfy all claims and demands upon the Company in respect of the policy; and no director signing a policy, nor any other director, proprietor or member of the Company, his heirs, executors or administrators, should be in anywise individually subject or liable to any such claim or demand, or to any process or execution in respect thereof, but should be and remain liable

1861.

BRAUNSTEIN
v.
ACCIDENTAL
DEATH
Insurance
Company.

1861.

BRAUNSTEIN
v.
ACCIDENTAL
DEATH
Insurance
Company.

to pay to the Company so much of the share or shares held by him, her or them in the capital as should not have been paid up; and that no other person should, on any account whatsoever, be in anywise subject or liable to any claim or demand in respect of any policy of insurance to be issued or granted by the Company. Secondly, in case of difference of opinion as to the amount of compensation payable in any case, the question should be referred to the arbitration of a person to be named by the secretary for the time being of the Master of the Rolls, and all expences and costs should be subject to the decision of such arbitrator, and the award made on such arbitration was to be taken as a final settlement of the question, and might be made a rule of Court. Thirdly. All premiums and other moneys which should have been paid to the Company in respect of any policy which might have become void, should, subject to the preceding regulations and conditions, be forfeited to the Company, and all claims upon the Company in respect of such policy should cease and be absolutely void. Fourthly. In all cases where any policy should, either originally or at any time after its commencement, be or become subject to any mortgage or mortgages, trust or trusts whatsoever, the receipt of the mortgagee or mortgagees, trustee or trustees, for the time being, for the money which might become payable in respect of such policy should, notwithstanding any equitable claim or demand whatsoever of the person or persons beneficially entitled to the policy, be an effectual discharge to the Company and all proprietors and members thereof. Fifthly. Before payment of the sum insured by any policy, proof satisfactory to the directors

should be furnished of the death or deaths, injury or injuries, accident or accidents, or other event or events on which such sum should become payable, and, if required by the directors, a medical or other agent of the Company was to be admitted to see the person killed or injured, and to examine the wound or injury received by him, when and as often as, in the opinion of the directors, it might be necessary. Sixthly. Every policy granted by the Company was granted upon the terms and conditions in the deed of settlement upon which the Company was formed, the provisions of which should have the same force and effect as if inserted in the policy. Seventhly. That if at any time it should be determined by the Company, in the manner specified in the deed of settlement, that the Company should be dissolved, a dissolution thereof should thereupon take place, in the manner and subject to the conditions contained in the deed of settlement, and thereupon the insurance effected by the within written policy should cease and determine, but the insurer should be entitled to receive back, from the funds of the Company then remaining unapplied and undisposed of, the amount of the premium within mentioned, provided the same should be claimed within six calendar months after notice of such dissolution should have been given in the *London Gazette* and in two *London* newspapers. Averment, that the declaration referred to in the policy was in all respects true, and that the terms and provisions of the deed of settlement, so far as the same were applicable to policies of the Company, were in all respects the same as and no other than the terms and provisions of the policy thereinbefore set forth : that the policy remained and continued in force up to and until, and upon and after, the 21st August, A. D. 1859, and

1861.

BRAUNSTEIN
V.
ACCIDENTAL
DEATH
Insurance
Company.

1861.

BRAUNSTEIN
V.
ACCIDENTAL
DEATH
Insurance
Company.

that, whilst the policy was in full force as aforesaid, the plaintiff, to wit on the day and year last aforesaid, while travelling on a line of railway in *Great Britain* by a passenger train, propelled by steam power, received and suffered bodily injury of a serious nature from a railway accident directly affecting himself within the meaning of the policy, which accident greatly injured the plaintiff's health and constitution, and he thereby became sick, sore, lame and disordered, and so remained and continued for a long space of time, during all which time the plaintiff was hindered and prevented from attending to his affairs and business.

The declaration concluded by averring performance by the plaintiff, and breach by the defendants.

Fourth plea. That by the deed of settlement of the said Company mentioned in the said conditions printed on the back of the said policy, it was declared and provided that, before payment of the sum insured by any policy, proof satisfactory to the directors of the said Company should be furnished by the claimant of the death or accident together with such further evidence or information, if any, as the said directors should think necessary to establish the claim. And the defendants say that, after the plaintiff had sustained the said injury by the said accident, and had made his claim in writing under the said policy upon the said Company for compensation in respect thereof, the directors of the said Company thought it necessary that the plaintiff should furnish to the said Company certain evidence or information to establish the said claim, of which the plaintiff, in a reasonable time after making the said claim and before the commencement of this action, had notice, and was then required by the said directors to furnish the

said evidence or information to them ; which the plaintiff wholly neglected and refused to do, although he could and might have obtained and furnished the same, nor did he furnish any proof satisfactory to the said directors of the said injury sustained by him.

Fifth plea. That, after the plaintiff had sustained the said injury and had made his claim in writing under the said policy upon the said Company for compensation in respect thereof, and before this suit, the amount or sum of money to which the plaintiff was entitled, by way of compensation for the said injury, became and was, and still is, a matter in dispute and difference between the plaintiff and the defendants, and although the defendants then were and ever since have been willing to refer the same to arbitration in manner mentioned in the conditions endorsed on the back of the said policy, yet the amount of the said compensation has never been settled or ascertained by arbitration as in the said conditions mentioned.

To the fourth plea the plaintiff replied that the said evidence or information which the plaintiff was required by the said directors to furnish to them, was not evidence or information which the said directors ought properly or reasonably to have required the plaintiff to furnish. And that the plaintiff did, duly and in accordance with the said policy and conditions, furnish, supply and provide the defendants, the said directors, and all other persons, with all due, reasonable, proper and sufficient evidence and information to establish the said claim, and such as ought reasonably to have satisfied the said directors and the defendants. And that the said directors unreasonably and capriciously refused to be satisfied with the said evidence and information so fur-

1861.

BRAUNSTEIN
V.
ACCIDENTAL
DEATH
Insurance
Company.

1861.
BRAUNSTEIN
v.
ACCIDENTAL
DEATH
Insurance
Company.

nished, applied and provided by the plaintiff as aforesaid ; and in thinking it necessary that the plaintiff should furnish, and in requiring the plaintiff to furnish, the said evidence or information in the said fourth plea mentioned they the said directors acted in an unreasonable and capricious manner.

To the fifth plea the plaintiff demurred, and the defendants demurred to the replication to the fourth plea.

Joinders in demurrer.

Horace Lloyd, for the plaintiff.—The fourth plea is bad. The directors are not empowered by the policy to exact from the assured any evidence they please. The clause requiring evidence satisfactory to the directors to be produced was meant as an instruction to the directors for their guidance between them and their shareholders. Besides, every clause in a deed should, if possible, receive a reasonable construction, and such as shall not be inconsistent with the general intention of the parties: “Expressum facit cessare tacitum.” This clause must therefore be understood to mean such evidence as the directors may *reasonably* require. In *Dallman v. King* (a), *Tindal* C. J., in delivering judgment, says, “Admitting this clause of the agreement to constitute a condition precedent, the next question is, whether the condition has been substantially performed. The stipulation consists of two parts: first, that the work should be done in a substantial manner; secondly, that it should be done to the satisfaction of the lessor. The gist of the agreement is, that the work should be done in a substantial manner; the approval of the lessor was added, for the purpose of enabling him to ascertain

(a) 4 *Bing. N. C.* 105. 109.

that the work had been done. It never could have been intended that he should be allowed capriciously to withhold his approval; that would have been a condition which would go to the destruction of the thing granted, and if so, according to the well known rule, the thing granted would pass discharged of the condition." Taking for granted, however, that the plea is good on its face, the replication alleges, which is admitted by the demurrer, that the refusal of the directors to receive the evidence offered them was unreasonable and capricious.

Then, as to the fifth plea, the words used in this case do not constitute the reference to arbitration a condition precedent to the plaintiff's right to recover. It is true that, in *Scott v. Avery* (a), one of the conditions in a policy of insurance on a ship was that the sum to be paid for loss or damage should, in the first instance, be ascertained and settled by the committee of the association; and if a difference should arise between them and any suffering member "relative to the settling any loss or damage, or to a claim for average, or any other matter relating to the insurance," the difference was to be referred to arbitration in a way pointed out: "provided always, that no member who refused to accept the amount of any loss as settled by the committee, &c., should be entitled to maintain any action at law, or suit in equity, on his policy, until the matters in dispute should have been referred to, and decided by, arbitrators, &c.; and then only for such sum as the said arbitrators should award:" and the obtaining the decision of such arbitrators was declared a condition precedent to the maintaining of an action; it was held that these conditions were lawful, and that (even should the difference relate

1861.

BRAUNSTEIN
V.
ACCIDENTAL
DEATH
Insurance
Company.

(a) 5 H. L. Co. 811; on error from the Exchequer Chamber, 8 Exch. 487. 497.

to other matters than those of mere amount) till an award was made no action was maintainable. But the words here are not so strong. The Company undertake, where the accident does not occasion the death of the assured, "to pay such sum by way of compensation as shall appear just and reasonable, and in proportion to the injury received;" and it then merely provides, "such sum to be ascertained in case of dispute or difference in manner provided by the stipulations and conditions indorsed," i. e., by reference to arbitration.

J. Brown (having been informed by the Court that they considered the fifth plea good).—In construing this policy, the intention of the parties is the thing to be ascertained. A condition precedent does not require any particular words for its creation; *Pordage v. Cole* (a), *Poole v. Hill* (b). In *Hotham v. The East India Company* (c), *Ashhurst J.*, in delivering the judgment of the Court, says, "There are no precise technical words required in a deed to make a stipulation a condition precedent, or subsequent; neither doth it depend on the circumstance, whether the clause is placed prior or posterior in the deed, so that it operates as a proviso or covenant. For the same words have been construed to operate as either—the one or the other, according to the nature of the transaction." The design of the clause on which the fourth plea is founded was to protect the Company from being imposed upon by false representations as to the existence or extent of accidents. In *Worsley v. Wood, in error* (d), which was an action on a policy of insurance against fire, in the proposals of an insurance

(a) 1 *Wms. Saund.* 319 l., 6th ed.

(c) 1 *T. R.* 638. 645

(b) 6 *M. & W.* 835.

(d) 6 *T. R.* 710.

Company which were to be considered part of the policy, it was stipulated that persons insured should forthwith give notice of the loss, deliver in an account, &c., and procure a certificate of the minister and churchwardens, some reputable householders of the parish, importing that they knew the character and circumstances of the assured, and knew or believed that he had sustained the loss through misfortune and without fraud; and it was held that the procuring such a certificate was a condition precedent to the right of the assured to recover. [*Wightman J.* That case is different. There the reference was to a third party.] *Brown v. Overbury (a)* was an action against the treasurer of a steeple chase to recover the amount of the stakes, which the plaintiff alleged were won by his horse: according to the articles, any dispute as to the race was to be decided by the stewards: a dispute having arisen, it was held that the plaintiff could not recover unless he shewed that he either had obtained or was unable to obtain a decision from the stewards. In arrangements with railway Companies it is common to agree that all matters in dispute shall be determined by the certificate of an engineer. [*Crompton J.* There the engineer is in effect the servant of both parties.] The object of the replication is to take from the directors the right given them by the policy of determining the existence and nature of a supposed accident, and transfer it to a jury. [*Wightman J.* Suppose the directors were to require the claimant to furnish evidence as to the state of the weather, or something similar.] That would not be germane to the subject matter. [*Crompton J.* It never could have been intended to give the directors the right to act capriciously.]

(a) 11 *Exch.* 715.

1861.

BRAUNSTEIN

V.
ACCIDENTAL
DEATH
Insurance
Company.

1861.
BRAUNSTEIN
v.
ACCIDENTAL
DEATH
Insurance
Company.

The directors act under the control of public opinion, for it is most injurious to Companies of this kind to bring disputed cases before the world. Besides, juries may be capricious as well as directors. [*Wightman J.* Perhaps so. But we cannot assume that they will be. *Blackburn J.* If the directors are to settle all questions between the Company and parties claiming compensation, what is the use of the clause providing for arbitration?] That clause is only applicable when the question is one of disputed *amount*.

WIGHTMAN J. The question in this case is, what effect is to be given to a clause in a deed of settlement, which is incorporated by one of the terms of the policy in the policy itself, "that before payment of the sum insured by any policy, proof satisfactory to the directors of the Company should be furnished by the claimant of the death or accident." And then there is this addition, "together with such further evidence or information, if any, as the said directors shall think necessary to establish that claim."

Now it is said that, by virtue of this clause, the directors have the power, if they please, wholly to withhold payment by capriciously, as asserted in the replication, and without any reasonable ground whatsoever, requiring further evidence perfectly immaterial to the matter in dispute. The question is, whether, giving a reasonable construction to the intention of the parties when the clause was introduced by reference into the policy, it can be understood that the assured did agree that, upon any ground whatsoever, capriciously or otherwise, which the directors, who are the parties to the suit, might think fit to urge, their decision should be binding? The

clause must receive a reasonable construction, and the parties must be taken to have had in view any further evidence which the directors might *reasonably* require ; such a construction would fulfil all the terms of that clause.

We have been referred to cases in which parties have agreed to refer the matter in dispute to the certificate of an arbitrator, that is to say, that no payment should be enforced by one against the other until a certificate was given that the work which was the subject matter of the proceeding had been completed ; but in such a case the reference is to a third person, and not as here to one of the parties ; and the effect of the clause, if it had the extensive construction contended for by Mr. *Brown*, would be that the directors might always refuse to pay, however improper or unreasonable such refusal might be, if they thought it inconvenient for the Society to do so. It seems to me that a reasonable construction must be given to this clause ; and I cannot but think that there is a good deal of weight in the observation that it is rather a clause directory as between the shareholders and directors of the Company, that the latter shall take care that sufficient evidence be brought before them, than a clause amounting to a condition precedent to the right of the assured to recover that the assured must adduce such evidence as the directors might require, though without any reasonable ground, and which the assured might be wholly unable to produce. I cannot put such a construction upon the deed as that. It only requires the introduction of the word "reasonable," and that I say must be implied, to remove the difficulty. The replication raises the point that the directors have required something which is unreasonable, and that they

1861.

BRAUNSTEIN
v.
ACCIDENTAL
DEATH
Insurance
Company.

1861.
BRAUNSTEIN
v.
ACCIDENTAL
DEATH
Insurance
Company.

have acted capriciously, and have acted therefore in a manner which disentitles them to set up such an answer as that which they have done. It is admitted that the assured might be required to produce a reasonable amount of evidence: but it is contended that the directors have no right to refuse, as the defendants admit by their demurrer that they have done, from capricious or unreasonable motives, to be satisfied with such evidence. It seems to me that that is an answer; that, by pointing out that they unreasonably and capriciously required evidence which was not necessary to satisfy them on any reasonable view of the case, it is shewn that they acted in contravention of what appears to me the proper and reasonable construction to be given to this clause. I therefore think that the fourth plea is bad, and the replication good. If it be necessary to give an answer to the plea, it is answered by the replication.

With respect to the fifth plea, it seems to me that the reference clause, as to the amount if disputed, is made a condition precedent to bringing an action, and I cannot read it otherwise. The clause in the policy is that they "should pay such sum by way of compensation as should appear just and reasonable." If the clause had stopped there no doubt there would have been no difficulty; but it goes on to say "and in proportion to the injury received such sum to be ascertained in case of difference or dispute in manner provided by the stipulations and conditions indorsed thereon," which is by reference to a gentleman who is to be named in a specified manner. Now there is clearly a difference and a dispute in the present case to which, as it seems to me, the reference clause applies, and makes it a condition precedent to the right to bring an action that the sum shall first be ascertained in the manner pointed out.

On these grounds the judgment should be for the plaintiff in respect to the fourth plea, and for the defendants in respect to the fifth plea.

1861.

BRAUNSTEIN
v.
ACCIDENTAL
DEATH
Insurance
Company.

CROMPTON J. The real question in all cases of this nature is that stated by *Ashurst J.* in *Hotham v. The East India Company* (a)—what was the intention of the parties? Now I cannot conceive that any Company would put before a person desirous of effecting an insurance with them a stipulation that, in order to establish the occurrence of an accident insured against, their own directors might require any evidence, however chimerical, capricious, and unjust the asking for it might be. The putting such a construction on a stipulation like this is opposed to the general rule, that when it is agreed that an act is to be done to the satisfaction of a party it must be understood to mean *reasonably* to his satisfaction. The cases where it is agreed between two parties that a disputed matter shall be determined by the certificate of a third person differ from the present, for there the act is to be done by a third person, whereas here it is to be done by one of the parties. The language of *Tindal C. J.* in *Dallman v. King* (b) is very important where he says that stipulations in a contract going to the destruction of the contract are inoperative.

I do not however say that this fourth plea may not be good, but then comes the replication, that, in the exercise of the power conferred on them, the directors acted in an unreasonable and capricious manner. Perhaps the question could have been raised under a general traverse of the plea, and the jury might say that this stipulation, understood in the above sense, is so unreasonable that

(a) 1 T. R. 638. 645.

(b) 4 Bing. N. C. 105.

1861.

BRAUNSTEIN
v.
ACCIDENTAL
DEATH
Insurance
Company.

no one could suppose it was ever intended to be so understood. I think, however, that the sounder construction of the document is to hold that what is stated in the replication to have been done by the defendants, never could have been intended; and, consequently, the plaintiff is entitled to judgment on the demurrer to the replication.

Then as to the fifth plea. I think this case comes within the principle of *Scott v. Avery* (a). In that case some of the Judges thought, and the Court of Exchequer held, that parties must not be permitted by their agreement to withdraw cases from the jurisdiction of the Courts of justice. But I think we may construe the having the amount determined by a third party as part of the cause of action; and a great Judge, Mr. Justice *Maule*, was of this opinion (b). It is said, that the words of the contract in *Scott v. Avery* (a) are stronger than those before us; and they are so in some respects. Here is a contract that in an event specified the Company will "pay such sum by way of compensation as should appear just and reasonable, and in proportion to the injury received, such sum to be ascertained, in case of difference or dispute, in manner provided by the stipulations and conditions indorsed thereon." It is said we must construe this as two sentences, and stop at the words "injury received." But "such sum" must have a word to govern it, and it evidently means such sum as shall be ascertained.

BLACKBURN J. I agree with the rest of the Court.

(a) 5 *H. L. Ca.* 811; on error from the Exch. Chamber, 8 *Exch.* 487, 497.

(b) See 8 *Exch.* 497, 498, 499.

I think the fourth plea is bad; and, if it even were good, it is answered by the replication. I quite admit that parties may make what they please a condition precedent, but it must be shewn that they so intended. Here the stipulation is the language of one party, the Company, and "*verba fortius accipiuntur contra proferentem.*" No doubt they might have stipulated that no money should be payable under a policy unless the directors obtained any evidence they chose to ask for, but it would require very distinct language, and much stronger than any used here, to shew that the parties so intended. Here also is an express provision for reference to arbitration, which would be quite idle if there were a general clause compelling the party injured to furnish any evidence the directors should require. But I think the plaintiff's counsel right in saying that that stipulation was only introduced with reference to the duty of the directors towards the Company, i. e. that the directors were not to settle a claim against the Company until they had got proper evidence. That is right in itself, but I do not understand the sixth condition indorsed on the policy to incorporate as part of the bargain such clauses in the deed as refer to the duties of the directors and shareholders towards each other.

As to the fifth plea, I quite agree that the parties have used sufficient words to make the reference to arbitration a condition precedent.

Judgment for the plaintiff on the
fourth plea, and for the defend-
ants on the fifth.

1861.

*Wednesday,
November 27th.*

IN THE EXCHEQUER CHAMBER.

*Master.
Negligence
of servant.
Person volun-
teering assist-
ance.*POTTER *against* FAULKNER.

While the defendant's porters were lowering bales of cotton from the defendant's warehouse, and his carter was receiving them into his lorry, the plaintiff, who was waiting with a lorry to receive a load of cotton for his master, at the request of the defendant's carter assisted him, and, in consequence of the negligence of the defendant's porters, a bale of cotton fell upon and injured him. There was no negligence or want of reasonable care on the part of the plaintiff or of the defendant's carter. Held, that the defendant was not liable to an action.

Degg v. The Midland Railway Company, 1 H. & N. 773, affirmed.

SPECIAL case stated, without pleadings, by order of the Court of Queen's Bench, and by consent of the parties.

The action was brought to recover damages for an injury suffered by the plaintiff by reason of the alleged negligence of the servants of the defendant. The plaintiff was a carter in the employ of Mr. *John Davies*, a master carter. The defendant was a carrier, having a warehouse at *Old Quay Wharf, Liverpool*.

In *December, 1858*, in pursuance of orders from his master, *John Davies*, the plaintiff went with a lorry to the defendant's warehouse to receive therefrom, on behalf of his master, a load of cotton bales. On his arrival at the warehouse, he found two lorries there before him, one in the act of being loaded with cotton from the defendant's warehouse, and the other waiting its turn to be so loaded. After the first of these lorries had been loaded, and had gone away, the second of them took its place

upon a piece of ground occupied by the defendant, and lying between his warehouse and the public street, but not being part of such street. This lorry was being loaded when the accident happened which is hereafter described. It belonged to the defendant, and the carter in charge of it was one of his servants.

The course of business as to loading was as follows:— Each lorry was in succession brought to the place above mentioned to be loaded. The defendant's porters brought the bales of cotton to the door of the warehouse, which was higher than the lorry, placed them in slings, and lowered them to the level of the lorry, where they were taken hold of by the carter in charge thereof, and by him drawn over the lorry, taken out of the slings, and packed on the lorry. A crane is made use of for this purpose, and by a chain attached to it the cotton is lowered. The lorry which was being loaded at the time of the accident was the property of the defendant, and the parties above and the carter below were his servants, of which the plaintiff, before the accident, had notice. The carter of the defendant's lorry, which was being loaded in the manner before mentioned, requested the plaintiff, who was waiting with his master's lorry for his turn, to help him to move into their proper places in his cart the bales which were being lowered for him. The plaintiff thereupon got upon the defendant's lorry, and was assisting him when the accident happened. Whilst the plaintiff and the defendant's carter were moving a bale of cotton to its proper place on the defendant's lorry, another bale, which was being made ready by the defendant's porters in the warehouse to be lowered on the plaintiff's lorry when it should in its turn come under the door of the warehouse, through the

1861.

POTTER
v.
FAULKNER.

negligence of those porters, fell from the warehouse, and struck and injured the plaintiff. There was no negligence or want of reasonable care on the part of the plaintiff or of the defendant's carter.

The question for the opinion of the Court was, whether on a trial in this suit, upon proof of the above facts, a jury would be entitled to give damages to the plaintiff, or, whether the Judge would be bound to nonsuit the plaintiff, or direct the jury to find a verdict for the defendant.

If the Court should be of opinion that the jury might give damages to the plaintiff, and that the Judge was not bound to nonsuit the plaintiff, or direct the jury to find for the defendant, it was agreed between the parties that the defendant should pay to the plaintiff 150*l.* and taxed costs; but if the Court should be of a contrary opinion, the plaintiff should pay to the defendant taxed costs: and judgment to be entered accordingly.

In *Easter* Term, 1860, the Court of Queen's Bench (*Cockburn* C. J., *Crompton*, *Hill* and *Blackburn* JJ.), without hearing any argument, were of opinion, on the authority of *Degg v. The Midland Railway Company* (a), that, upon proof of the above facts, the Judge at the trial would be bound to nonsuit the plaintiff or to direct the jury to find a verdict for the defendant, but suggested that the case should be taken to a Court of error.

Judgment having been accordingly entered for the defendant, the plaintiff brought error. The case was argued (*November* 26th), before *Erle* C. J., *Byles* and *Keating* JJ., and *Channell* and *Wilde* BB., by

Brett, for the plaintiff. A master is clearly liable to

(a) 1 H. & N. 773.

his servant for his own negligence: *Roberts v. Smith*, in Exchequer Chamber (a). The fact of the plaintiff having volunteered, under the circumstances, to assist the carter, who was the servant of the defendant, does not absolve the defendant from being liable for the negligence of his servants by which the injury to the plaintiff was caused. The maxim, *Qui facit per alium, facit per se*, is the foundation of the liability of a master for the consequences of his servant's negligence: 5 *Bac. Abr. Master and Servant*, K. p. 366, 7th ed.; *Lane v. Sir Robert Cotton* (b), per *Holt* C. J.; note to *Weyland v. Elkins* (c); *Sadler v. Henlock* (d), per *Crompton* J.; which maxim would make a master liable to his servant for the negligence of his fellow servant, because it makes him as liable for the act of the negligent servant as if it were his own act.

It has, indeed, been held that a master is not liable to his servant for injury occasioned by the negligence of a fellow servant in the course of their common employment, provided the latter be a person of competent care and skill. One of the grounds however on which this exception has been rested is, that a servant has the means of knowledge whether his fellow servants are negligent or not, and it is at his option to leave the service. [He referred to the judgment of Lord *Cranworth* C. in *Bartonshill Coal Company*, appts., *Reid*, resp. (e), and the judgment of the Court of Exchequer in *Priestley v. Fowler* (f).] But the accident might occur on the first day of the service, before the servant had any opportunity of knowing the character of his fellow servants, though, if the work were continued

1861.

POTTER
v.
FAULKNER.

(a) 2 *H. & N.* 213.

(c) *Holt*, *N. P. C.* 227. 229.

(e) 3 *Macq.* 266. 284.

(b) 12 *Mod.* 472. 488, 489.

(d) 4 *E. & B.* 570. 578.

(f) 3 *M. & W.* 1. 6, 7.

for several days, the means of such knowledge would be afforded. And this ground of exception would apply to persons engaged in a common work, though not in a common service; yet in that case it has been held that the injured person may recover against the master for the negligence of his servants: *Abraham v. Reynolds* (a). Another ground assigned for this exception is that there is an implied contract that the servant will not hold the master liable for an injury caused by the negligence of a fellow servant. *Alderson B.*, in delivering the judgment of the Court in *Hutchinson v. The York, Newcastle and Berwick Railway Company* (b), said: "A servant, when he engages to serve a master, undertakes, as between him and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow servant, whenever he is acting in the discharge of his duty as servant of him who is the common master of both." And in *Bartonshill Coal Company*, appts., *Reid*, resp. (c), Lord Cranworth C. said: "When several workmen engage to serve a master in a common work, they know, or ought to know, the risks to which they are exposing themselves, including the risks of carelessness against which their employer cannot secure them, and they must be supposed to contract with reference to such risks."

But neither of the grounds for this exception applies to the case of a person offering his services: he has no means of knowing the competency of the servants employed; and he cannot be supposed to have contracted on the terms that he would run the risk of their incompetency, because there is no contract by him,

(a) 5 H. & N. 143.

(b) 5 Exch. 343. 352.

(c) 3 Macq. 266. 295.

1861.

 POTTER
 V.
 FAULKNER.

nor had the servants of the employer any authority to make one with him. The maxim *Volenti non fit injuria* does not apply, because the volunteer does not consent to undergo the risk of the negligence of other persons. A person who is a trespasser may maintain an action for injury caused by the negligence or wrongful act of another, as by setting a spring gun on his land; *Bird v. Holbrook* (a). [Erle C. J. The law of *England*, in its care for human life, requires consummate caution in the person who deals with dangerous weapons. You may put aside that class of cases.] It must be contended by the defendant that it is less incumbent on the master to take care of a person whom his servant asks to assist him than of other persons. [Byles J. Suppose the plaintiff had been guilty of negligence in moving one of the bales of cotton, and by that negligence a passer by had been injured, and brought his action against the defendant.] The defendant would have said, "I never employed him, and my servant had no authority to employ him." *Degg v. The Midland Railway Company* (b) attempts to set up a distinct exception to the maxim *Qui facit per alium, facit per se*, because it admits that, if the negligence had been the act of the master, he would have been liable; and the reasoning and the instances given in the judgment do not apply to a volunteer as distinguished from a trespasser. [Channell B. Those observations were made to meet the arguments at the bar, not as the grounds of the judgment.]

Aspinall, for the defendant (*November 27th*), was not called upon.

(a) 4 *Bing.* 628.

(b) 1 *H. & N.* 773.

1861.

POTTER
v.
FAULKNER.

ERLE C. J. delivered the judgment of the Court.

The plaintiff had been injured by the fall of a bale of cotton, in the course of removing cotton from the warehouse of the defendant. Some of the servants of the defendant were employed in lowering the bales of cotton from the warehouse, and another of his servants was stationed below to receive them into the defendant's cart. The plaintiff intervened to assist the servant who was in the cart, and, so far as the master was concerned, was a volunteer upon the occasion, and was injured by what was found to be negligence in the defendant's servants in the warehouse. The question is, Can the plaintiff, under the circumstances, sue the master for the negligence of his servants?

This is the case of one who volunteers to associate himself with the defendant's servant in the performance of his work, and that without the consent or even the knowledge of the master. Such an one cannot stand in a better position than those with whom he associates himself in respect of their master's liability: he can impose no greater obligation upon the master than that to which he was subject in respect of a servant in his actual employ. And it is clear law that the master would not have been liable if the servant below had been injured by the negligence of the servants above. As between master and servant the duty of the master is to take due care to employ other servants of competent skill and ordinary carefulness: when he has done that he has done his duty as between himself and his servants; and we are of opinion that the liability contended for by the plaintiff does not attach to an employer.

We have considered the case of *Degg v. The Midland*

Railway Company (a), and we are of opinion that it was well decided, and we affirm the principle of that judgment. We therefore affirm the judgment of the Court of Queen's Bench.

1861.

 POTTER
v.
FAULKNER.

Judgment affirmed.

(a) 1 H. & N. 773.

**JOLLY against The WIMBLEDON and DORKING
Railway Company.**

[Friday,
June 15th,
1860.]

By the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18. s. 124., if, after the promoters of the undertaking have entered upon lands which they are authorized to purchase, and which are permanently required, any party shall appear to be entitled to any interest in or charge thereon which through mistake was not purchased, then the promoters shall remain in undisturbed possession; provided within six months after notice of the interest or charge, in case the same is not disputed, or, in case the same shall be disputed, then, within six months after the right thereto shall have been established by law, they pay the compensation therein mentioned. The defendants, a railway Company, under their Act, which incorporated the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18., in July, 1858, entered upon lands of which the mortgagor had been in possession; and although the purchase money was not paid to him, the parties were treating for arrangement, and the entry was with the knowledge and consent of the mortgagor. The plaintiff was mortgagee in fee of these lands, but the mortgage was not known by the defendants to exist until the plaintiff's attorney, having discovered the entry by the defendants, sent a letter in August, 1859, to the defendants' attorney, asserting the plaintiff's rights. A correspondence ensued, in which the plaintiff gave no information of his title and the defendants did not dispute his title, but asked for a short delay while their legal advisers were absent from London. In the following October the plaintiff brought ejectment. Held, by the Court of Queen's Bench, on the authority of *The Marquis of Salisbury v. The Great Northern Railway Company*, 5 C. B. N. S. 174, that the plaintiff might bring ejectment to establish his title, though execution upon the judgment would be stayed for six months. Held, by the Exchequer Chamber (reversing the judgment of the Queen's Bench), that ejectment could not be maintained, inasmuch as, the title not being in dispute, the above enactment gave the defendants a right of possession for six months after notice of the plaintiff's claim.

*Railway
Company.
Lands Clauses
Consolidation
Act, 1845,
s. 124.
Land taken
by mistake.
Notice of
claim.
Ejectment.*

EJECTMENT, brought the 25th October, 1859, to recover two pieces of land, being respectively parts

[1860.]

JOLLY
v.
WIMBLEDON
and
DORKING
Railway
Company.

of a close of land and of an occupation road, at *Merton*, in the parish of *Merton*, in the county of *Surrey*.

The defendants appeared on the 12th *November*, 1859, and defended for the whole of the said premises.

On the trial, before *Wightman J.*, at the *Surrey Spring Assizes*, in 1860, the following facts and circumstances were proved or admitted.

The plaintiff was, at the time of the entry by the defendants into and taking possession of the premises, seised in fee thereof, subject to a mortgage deed and all rights created thereby.

Upon the 8th *July*, 1840, *Edward Rayne* (since deceased) was the owner in fee of five equal undivided sixth parts of a certain farm and estate, called the *West Barnes Farm*, of which farm and estate the premises were parcel.

Upon the 8th *July*, 1840, *Edward Rayne* executed a deed of appointment and release, whereby he mortgaged the said five undivided sixth parts to the plaintiff *John Jolly* in fee, to secure the repayment, with interest, of a loan of 5000*l.*, advanced to him by the plaintiff. This deed gave to the mortgagor a power of sale and a power of entry in default of payment of the mortgage money or interest. And it also contained the following provisions:—

“ Provided always, and it is hereby mutually agreed and declared between and by the said *Edward Rayne* and the said *John Jolly* that in case default shall be made in payment of the said sum of 5000*l.*, or the interest thereof, or any part thereof, respectively, contrary to the aforesaid proviso or agreement for the payment of the same, and the true intent and meaning of these presents; then and in such case the said *Edward Rayne*, from the

said 8th *January* next, shall become tenant from year to year to the said *John Jolly*, his heirs or assigns, of the several and respective parts and shares respectively, hereby appointed, released and confirmed, or otherwise assured or intended so to be, of and in the said farm, messuage or tenement and farmhouse, fields, closes, lands, hereditaments and premises, and of and in the appurtenances, at the yearly rent of 200*l.*, payable by two half yearly payments, on the 8th *January* and the 8th *July*. Provided always that the tenancy hereby created shall not in any manner control, restrain or interfere with the power of sale or other the powers hereinbefore contained, but shall at all times be subject thereto, and to any exercise thereof respectively, anything hereinbefore contained to the contrary thereof in anywise notwithstanding."

The mortgage money was never repaid, and the mortgage still continued in force, but the plaintiff never entered into possession of or exercised the power of sale with respect to the mortgaged property, or any part thereof, nor did he at any time before the commencement of the action give to *Edward Rayne*, or the mortgagor for the time being, any notice for determining the yearly tenancy (if any) created by the deed.

Upon the 4th *August*, 1841, by an agreement made between all proper parties, it was agreed that the farm and estate should be divided and partitioned between *Edward Rayne* and the owner in fee of the remaining one undivided sixth part, and thenceforward the mortgage applied to and took effect as to the share or portion appropriated to *Edward Rayne* upon such partition. The premises sought to be recovered were parcel of this share or portion.

[1860.]

JOLLY
v.
WIMBLEDON
and
DORKING
Railway
Company.

[1860.]

JOLLY
v.
WIMBLEDON
and
DORKING
Railway
Company.

Upon the 12th *May*, 1847, *Edward Rayne* died, and under his will his three sons and two daughters became entitled to the estate or interest of the mortgagor in the last mentioned share or portion, and they and Mrs. *Rayne*, the widow of *Edward Rayne*, or some of them, had possession of and occupied the same accordingly.

The defendants were formed and constituted a Company, by and under "The *Wimbledon and Dorking Railway Act*, 1857," with which Act "The *Lands Clauses Consolidation Act*, 1845," 8 & 9 *Vict. c. 18.*, and "The *Railways Clauses Consolidation Act*, 1845," 8 & 9 *Vict. c. 20.* were incorporated. By the 21st section the defendants were authorized, subject to the provisions of that Act, to make and maintain the railway as therein mentioned, and to enter upon, take and use all or any of the lands delineated upon the deposited plans, and described in the book of reference as might be necessary for those purposes. The defendants shortly after their incorporation did all necessary acts required by the 16th and 17th sections of "The *Lands Clauses Consolidation Act*, 1845," 8 & 9 *Vict. c. 18.*

The premises sought to be recovered were part of the lands delineated upon the deposited plans and described in the book of reference, and were necessary for the making and maintaining of the railway.

The entry in the book of reference with respect to these premises was as follows:—

Nos. referring to the Plan.	Description of Property.	Names of Owners or re- puted Owners.	Names of Lessees or reputed Lessees.	Occupiers' Names.
1	Occupation Road	<i>Mary Rayne</i>	—	In hand.
7	Meadow	<i>Mary Rayne</i>	—	In hand.

And the name of the plaintiff had never been inserted in the book of reference as owner or occupier of, or interested in, the said lands. In *July*, 1858, the defendants entered upon and took possession of the premises for the purposes of their railway. This entry and taking possession by them was with the full knowledge and consent of the children of *Edward Rayne* and of *Mrs. Rayne*, who were at that time in actual possession and occupation, but the plaintiff had no notice or knowledge of such entry and taking possession, and gave no consent thereto. And the defendants, without the knowledge or consent of the plaintiff, proceeded to construct the railway and works authorized by their Act of Parliament, and completed the same at some time previous to the 4th *April*, 1859, when the railway was opened for traffic, and the premises have ever since been and formed part of the railway of the defendants, and are permanently required for the purposes of the special Act.

The defendants never obtained or applied for any conveyance of the premises from the children of *Edward Rayne* and *Mary Rayne*, or from any of them, or from any other person.

At the time the defendants so entered and took possession, and until they received the letter of the 31st *August*, 1859, hereinafter mentioned, the defendants had no notice of the mortgage, and were during all that time wholly unaware that the plaintiff had or claimed any estate, right or interest in, or charge affecting, the premises. They had no knowledge as to any person being interested in the premises except the children of *Edward Rayne* and *Mrs. Rayne*, or some of them, and were negotiating with them accordingly as to

[1860.]

JOLLY
v.
WIMBLEDON
and
DORKING
Railway
Company.

[1860.]

JOLLY
v.
WIMBLEDON
and
DORKING
Railway
Company.

the amount of the purchase money and compensation to be paid by the defendants for the premises.

Upon the 31st *August*, 1859, Mr. *J. Cary*, the *London* solicitor for the plaintiff, who had then very recently discovered the entry into and taking possession of the premises by the defendants, wrote and sent to Mr. *W. G. Roy*, their solicitor, a letter, of which the following is a copy.

“ 26, *Moorgate Street*, E.C.,

“ Sir.

“ 31st *August*, 1859.

“ I am instructed by Mr. *John Jolly*, the mortgagee of the *West Barnes Park Estate*, *Merton*, in *Surrey*, to apply to *The Wimbledon and Dorking Railway Company*, upon the subject of the encroachment made by the Company in the construction of the line of railway across a portion of the estate, and the serious permanent damage which has been occasioned to the entire property and approaches by the formation of the line. I have now to direct attention to the fact that no notice was ever served or given to my client of the intention of the promoters of the Company to apply to Parliament, or that the portion of the Estate so illegally taken by the Company would be required or had been taken, and now for some time used, by the Company without my client's knowledge or consent. In truth my client was, until very recently, entirely ignorant of this railway, or that any portion of this property was or had been affected by any public works whatever. My client is however willing, before involving the Company in an expensive legal proceeding, to meet the matter fairly, and accept an adequate compensation for the portion of the Estate taken to the great injury sustained to the remainder; and I have therefore (but strictly without prejudice to

my client's rights both legal and equitable) to give this intimation to you, and to inquire whether the directors of the Company are prepared to meet the case on the same footing, and in an equally straightforward manner.

"Having been informed that you are the solicitor to *The Wimbledon and Dorking Company*, I have therefore addressed my communication, in the first instance, to you; and I have to request that you will give your immediate attention to this matter, and favour me with a speedy reply.

"I am Sir, your very obedient Servant,
G. Roy Esq., Solicitor, "Joseph Cary."
Great George Street, Westminster."

This letter, in the absence from *London* of Mr. Roy, was received and opened by his clerk, Mr. Rogers. A correspondence ensued between Mr. Cary and Mr. Rogers, Mr. Cary and Mr. Roy, and Mr. Cary and Mr. Horn, the secretary to the defendants; the letters on one side urging that the claim should be settled speedily, and the letters on the other side, not disputing the title of the plaintiff, but asking for time on account of the absence of their legal advisers from *London* at that time of the year.

At the time of the commencement of the action, the defendants had not inspected or applied for, or been offered, the inspection of the mortgage deed.

The defendants were willing to purchase or pay compensation for the estate or interest of the plaintiff in the said premises, and also to pay such further mesne profits or interest as are provided for by the 124th section of The Lands Clauses Consolidation Act, 1845.

Upon these facts and circumstances the learned Judge directed the jury to find a verdict for the plaintiff, reserving leave to the defendants to move to enter the verdict

[1860.]

JOLLY
 v.
 WIMBLEDON
 and
 DORKING
 Railway
 Company.

[1860.]

JOLLY
v.
WIMBLEDON
and
DORKING
Railway
Company.

for them or a nonsuit ; and a verdict for the plaintiff was found and entered accordingly.

In *Easter* Term, 1860,

Hawkins obtained a rule nisi accordingly, on the grounds : First. That the plaintiff had not, under the mortgage deed of the 8th *July* 1840, a good title in possession entitling him to maintain ejectment. Secondly. That a tenancy was outstanding in the said lands. Thirdly. That the plaintiff's estate, right, interest and charge in the lands in question were not disputed by the defendants, who through mistake or inadvertence had omitted duly to purchase or pay compensation for the same, and that the defendants were willing to purchase or pay compensation for them ; and that the action was commenced within six months after the defendants first had notice of such estate, right, interest and charge, contrary to the provision of sect. 124 of The Lands Clauses Consolidation Act, 1845. Fourthly. That, under that section, the defendants were entitled to the undisturbed possession of the lands in question to a period subsequent to the commencement of this action. Fifthly. That the possession of the defendants was lawful, and that the plaintiff was not entitled to bring ejectment, but only to claim compensation under The Lands Clauses Consolidation Act, 1845.

At the sittings in banc in the following *Trinity* Vacation, *June* 15th,

Bovill shewed cause, and cited *The Marquis of Salisbury v. The Great Northern Railway Company* (a).

Horace Lloyd, contra.

(a) 5 C. B. N. S. 174.

Per CURIAM, (WIGHTMAN, CROMPTON, HILL and BLACKBURN JJ.) We are bound by the authority of that case. The rule must therefore be discharged, but execution will be stayed in order to enable the Company to acquire possession of the land in the regular way.

Rule discharged.

[1860.]

JOLLY
v.
WIMBLEDON
and
DORKING
Railway
Company.

IN THE EXCHEQUER CHAMBER.

1861.

JOLLY *against* The WIMBLEDON and DORKING
Railway Company.

Wednesday,
December 4th.

For head note, see *antè*, p. 807.

THE defendants having appealed to the Exchequer Chamber,

In *Michaelmas* Vacation (Nov. 26th, 1861), before
ERLE C. J., WILLIAMS, BYLES and KEATING JJ., BRAMWELL, CHANNELL and WILDE BB.

Horace Lloyd was heard for the appellants (the defendants below).—First. The defendants were entitled, under sect. 124 of The Lands Clauses Consolidation Act, 1845, 8 & 9 *Vict. c. 18.*, to the undisturbed possession of the lands in question for a period subsequent to the commencement of this action. That section enacts: "If at any time after the promoters of the undertaking shall have entered upon any lands which . . . they were authorized to purchase, and which shall be permanently required for the purposes of the special Act, any party shall appear to be entitled to any estate, right, or interest

1861.

JOLLY
V.
WIMBLEDON
and
DORKING
Railway
Company.

in or charge affecting such lands which the promoters of the undertaking shall through mistake or inadvertence have failed or omitted duly to purchase or to pay compensation for, then, whether the period allowed for the purchase of lands shall have expired or not, the promoters of the undertaking shall remain in the undisturbed possession of such lands, provided, within six months after notice of such estate, right, interest, or charge, in case the same shall not be disputed by the promoters of the undertaking, or in case the same shall be disputed then within six months after the right thereto shall have been finally established by law in favour of the party claiming the same, the promoters of the undertaking shall purchase or pay compensation for the same, and shall also pay to such party, or to any other party who may establish a right thereto, full compensation for the mesne profits or interest which would have accrued to such parties respectively in respect thereof during the interval between the entry of the promoters of the undertaking thereon and the time of the payment of such purchase money or compensation by the promoters of the undertaking, so far as such mesne profits or interest may be recoverable in law or equity, &c."

The plaintiff was entitled to a charge upon the lands in question; and the defendants, "through mistake or inadvertence, had omitted duly to purchase, or to pay compensation for" it. Also the defendants did not dispute the charge when they had notice of it, and would have been willing to purchase or pay compensation. Therefore they are within sect. 124: and six months not having elapsed from the time when they first had notice of this charge, the action of ejectment was prematurely brought. Sect. 68 gives to the party

"entitled to any compensation in respect of any lands or of any interest therein," the opportunity of obtaining complete satisfaction for the lands, "which shall have been taken for or injuriously affected by the execution of the works;" and then the Act contains sections "with respect to lands subject to mortgage," and deals with the mortgagee as an incumbrancer. By sect. 108, power is given to the promoters to purchase or redeem the interest of the mortgagee, whether he be in possession of the lands by virtue of the mortgage or not; and, by sect. 112, provision is made for the case in which part only of the mortgaged lands is required for the purposes of the undertaking. The interests of the mortgagor and mortgagee are regarded together as they would be in a Court of equity. Sect. 124, is one of the three sections, "with respect to interests in lands which have by mistake been omitted to be purchased;" and it contemplates two cases, first, where the existence of the estate, interest or charge, is not disputed by the promoters of the undertaking, and, secondly, where it is disputed. Sect. 126 tends to shew that ejectment is the proper mode of trying the question of title in those cases only in which the estate, interest or charge is disputed by the Company; by that section, when the right to any estate, interest or charge "shall have been disputed by the Company, and determined in favour of the party claiming the same," the Company shall "pay the full costs and expences of any proceedings at law or in equity for the determination or recovery of the same." The payment of full costs is exacted from the Company, and therefore it was not intended that they should be exposed to ejectment, unless they disputed the title.

1861.

JOLLY
V.
WIMBLEDON
and
DORKING
Railway
Company.

1861.

JOLLY
v.
WIMBLEDON
and
DORKING
Railway
Company.

The decision in *The Marquis of Salisbury v. The Great Northern Railway Company* (a) was upon that part of sect. 124 which provides for the case in which the estate, interest or charge is disputed: the Court of Common Pleas held that, the title to the land being in dispute, ejectment was the proper mode of trying that question; and that after the plaintiff's title had been established, the Company might have the benefit of the provision that they should remain in possession six months by the Court restraining the execution. When the Company admit the existence of a charge, they are allowed six months to determine whether they will give up the land or purchase it, and what compensation they will offer; and ejectment does not lie any more than trespass would. [*Channell B.* Suppose the Company have notice of the charge and do nothing.] It would be a question for the jury whether they disputed the existence of the charge. Ejectment for the purpose of determining title can only be brought within six months; and therefore it lies upon the plaintiff to shew that there was a dispute which required to be settled by ejectment. In this case the title of the plaintiff was not disputed.

Secondly. The plaintiff had not, under the mortgage deed, a good title in possession enabling him to maintain ejectment, inasmuch as a tenancy was created in the mortgagor, which tenancy was never determined, and was outstanding in the representatives of the mortgagor at the time of the commencement of the action. [He referred to the provisions of the deed.]

Bovill, for the respondent (the plaintiff below).—First.

(a) 5 C. B. N. S. 174.

Sect. 124 of stat. 8 & 9 *Vict. c. 18.* is not inconsistent with the right to bring ejectment : effect will be given to it, by holding that it does not bar the right of action but only restrains the writ of possession upon the judgment recovered in the action from issuing until the expiration of the six months. No mistake or inadvertence of the Company, and no abstaining by them from disputing the title, would operate either together or separately as a bar to the right of action ; if it would, it does not appear in this case that there was any mistake or inadvertence of the defendants. The omission by the defendants to admit the plaintiff's title was an omission in their own default. [He cited *Hyde v. The Mayor of Manchester (a).*] The defendants ought to have shewn that they paid compensation to the plaintiff within six months after notice of the plaintiff's charge, and, not having done so, they lose the benefit of sect. 124, and are made trespassers ab initio. Further, the defendants dispute the title of the plaintiff by defending this action, and therefore are not within sect. 124.

Secondly. No tenancy was created by the mortgage deed ; or, if any was created, it was only a tenancy at will and was determined by the bringing of this action. [He cited *Doe d. Garrod v. Olley (b)*, *Doe d. Snell v. Tom (c)*, *The Metropolitan Counties and General Life Assurance Society v. Brown (d)*, *Doe d. Wilkinson v. Goodier (e)*.

Horace Lloyd, in reply.

Cur. adv. vult.

(a) 5 *De G. & Sm.* 249.

(b) 12 *A. & E.* 481.

(c) 4 *Q. B.* 615.

(d) 4 *H. & N.* 428.

(e) 10 *Q. B.* 957.

1861.

JOLLY
v.
WIMBLEDON
and
DORKING
Railway
Company.

ERLE C. J. (*Dec. 4th*) delivered the judgment of the Court.

This ejectment was brought for lands taken by the Railway Company according to the provisions of the Acts relating thereto, of which lands the mortgagor had been in possession; and, although the purchase money was not paid to him, the parties were treating for an agreement, and the taking of those lands was lawful as far as the interest of the party in occupation was concerned. The plaintiff was mortgagee in fee of these lands, but the mortgage was not known by the defendants to exist till he sent the letter in *August*, 1859. After this, letters ensued in which the plaintiff gave no information of his title and the defendants did not dispute his title, but asked for a short delay while their legal advisers were absent from *London*. In the following *October*, the plaintiff brought this ejectment, and the question is whether, under these circumstances, the 124th section of The Lands Clauses Consolidation Act, 1845, affords a defence.

This section relates to lands which have, by mistake, been omitted to be purchased, and enacts that if, after the promoters have entered on lands, which they are authorized to purchase and which are permanently required, any party shall appear to be entitled to any interest or charge thereon which, through mistake, was not purchased, then the promoters shall remain in undisturbed possession: provided that within six months after notice of the claim, or in case of dispute of title within six months after title shall have been established by law, they pay the compensation therein mentioned. The defendants contend that their right to undisturbed possession during six months is a bar to an action of ejectment, which must be founded on a supposed wrong-

ful possession during that time, and we are of opinion that the defendants are right.

The statute provides for the taking of lands under every modification of interest, and for the making of compensation in respect of any lawful claim ; and it has been uniformly held that, wherever compensation is provided under the statute in respect of any claim, there the common law remedies in respect of that claim are suspended or taken away. By the sections preceding the 124th, provisions are made in respect of interests known when the lands are taken : the taking is made lawful to the Company, the compensation is secured to the owner, and the ordinary remedies at law for the taking alleged to be wrongful are taken away. Then follows sect. 124, with respect to interests in lands which have been already taken, and which interests, by mistake, have been omitted to be purchased. The intention of the section, by analogy with what has preceded, would be to give the same protection against actions in respect of these interests as had been before given in respect of other interests in land. The words are, the Company " shall remain in undisturbed possession " if they duly compensate. These words express that the possession not only is then lawful, but has been, and shall continue so, if the condition is performed. It is very reasonable that a Company giving all parliamentary publicity with plans and books of reference, should have security from litigation for their works under their statute : it is expressly given in respect of all possible known interests, and it seems unreasonable to suppose that an unknown interest should alone be intended to have the privilege of bringing an action against the Company, together with a right to compensation under the statute. If,

1861.

JOLLY
v.
WIMBLEDON
and
DORKING
Railway
Company.

1861.

JOLLY
v.
WIMBLEDON
and
DORKING
Railway
Company.

during parliamentary enquiry and the Company's treaty with the mortgagor and the laying down of the railway on the lands, the mortgagee kept his mortgage unknown, the Company ought to have time to inquire after notice of the claim ; that is, after production of the abstract of title. The claim may be unfounded or fraudulent, or it may involve claims of other parties. The necessity for time and caution is shewn by *Doe d. Hyde v. The Mayor of Manchester (a)*, for there the Company had paid for the land in question to one proprietor, and had to pay for it again to Mr. *Hyde*, with all mesne profits and costs, as between attorney and client, because the arbitrator had made a mistake in the boundary between two properties. Here the questions of the validity of the deed, of its operation on five sixths of the land, of deducting what is due to the mortgagee from the compensation to be paid to the mortgagor, and of deducting for the right of the lessee if any should exist, must be considered before the compensation can be settled. If the possession of the Company is lawful for six months after the title is produced, or the dispute determined, all rights and liabilities would be secured in good order, and this defence would prevail. On the other hand, if ejectment lies for every claimant of an unknown interest before he shews the ground of his claim and allows time for considering it, confusion and disorder will be introduced : for the Company will have to decide whether they will suffer judgment by default and hazard the stay of execution upon a conflict of affidavits, or defend the cause with all the risks and imputations brought upon the present defendants for so doing ; and also if within six months compensation is made, any judgment that should have been obtained

(a) 5 De G. & Sm. 249.

1861.

 JOLLY
 v.
 WIMBLEDON
 and
 DORKING
 Railway
 Company.

would thereby become futile; and then no provision is made in respect of costs either to the claimant as between party and party or as between attorney and client, or to the Company, in respect of useless litigation which the claimant chose to force them to; and all this for no other purpose than securing some promptness in making compensation—about which litigation has probably increased if not created the delay.

In the case of *The Marquis of Salisbury v. The Great Northern Railway Company (a)*, the title was shewn and disputed, and ejectment was brought to try the title, and it was doubted whether ejectment would lie for lands of which the possession was to be undisturbed; but it was held to be by implication given in the case where the title should be disputed, solely for the purpose of trying the title, execution being stayed as soon as that purpose should be effected. If the title is disputed, the section may be held to give by implication a right to resort to law, and by limiting the right to the case of disputed title all would be in order; but if it is given where there is no dispute of title the confusion above described would follow.

This judgment does not conflict with any opinion of the Court below, who considered that the point here was within *Lord Salisbury's Case*; but, as above mentioned, that case appears to us to have no application to the present, because the title there was disputed,—here it is not.

For these reasons we think the defendants are entitled to succeed and that the judgment of the Court below should be reversed.

Judgment reversed.

(a) 5 C. B. N. S. 174.

1861.

MEMORANDA.

On the last day of *Michaelmas* Term, Mr. Justice *Hill* resigned his office as Judge of this Court, in consequence of ill health.

In the Vacation, *John Mellor*, Esq., one of her Majesty's Counsel, was appointed a Judge of this Court; having been previously advanced to the degree of the coif, when he gave rings, with the motto "*Lex ratione probata.*"

END OF MICHAELMAS VACATION.

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

HILARY TERM,

XXV. VICTORIA.

The Judges who usually sat in Banc in this
Term were:

COCKBURN C. J.		CROMPTON J.
WIGHTMAN J.		MELLOR J.

Ex parte HERBERT, an articted clerk.

Monday,
January 13th.

The applicant had been articted as clerk to his father and served the five years required by law without the applicant's knowledge, as he alleged, that the articles were not stamped. The affidavit of the father stated that, having before the articles been subject to much pecuniary loss and pressing expenses, and a diminution of professional income on account of the changes in the law and personal and family affliction, he was at the time of the articles without the means to pay the stamp duty thereon; and that he had not articted the applicant speculatively, but with the intention of ultimately stamping and enrolling the articles. The Lords of the Treasury having, under stat. 19 & 20 Vict. c. 81. s. 3, directed the Commissioners of Inland Revenue to stamp the articles upon payment of the duty and penalty, and the articles having been stamped accordingly: Held, by Cockburn C. J., Wightman and Mellor JJ., Crompton J. dissentiente, that they might be enrolled, and the service under them be computed from the date of their execution.

*Attorney.
Articles of
clerkship.
Omission to
stamp.
19 & 20 Vict.
c. 81.*

THIS was a motion that the applicant might have
leave to enrol his articles of clerkship, and that the

1862.

Ex parte
HERBERT.

service thereunder should count from the 16th *August*, 1856, being the day of their execution. The affidavit of the applicant stated that, at the age of eighteen years, he was, by articles of clerkship, dated the 16th *August*, 1856, articted to his father, an attorney at law, for five years, which expired on the 16th *August*, 1861; that he had served his father as his articted clerk during the said term; that at the time of entering into the articles he did not know that it was necessary that they should be stamped before execution, or that it was necessary that they should be enrolled; that when the articles were executed they were kept by his father in his own possession, and he never afterwards saw them until last *October*, when his father gave them to him, and he found that they had not been stamped, nor enrolled; that he presented a memorial to the Lords Commissioners of Her Majesty's Treasury praying that the Commissioners of Inland Revenue might be permitted to stamp the articles; and that their lordships had been pleased to authorize the Commissioners to affix the necessary stamp on payment of a penalty of 50*l.*, in addition to the duty of 80*l.* The affidavit of the father of the applicant stated in substance that, having before the applicant was articted to him been subject to much pecuniary loss and various pressing expences, and a diminution of professional income on account of the changes in the law and personal and family affliction, he was at the time of the articles wholly without the means to pay the stamp duty thereon; that the articles were not duly stamped before their execution, nor enrolled within six months from their date and execution for these reasons, and because he thought that, under stat. 19 & 20 *Vict. c. 81.*, they could be afterwards stamped on payment of the penalty mentioned in that

statute; that he had no preconceived plan to article the applicant speculatively, but had articulated him solely with the intention of ultimately stamping and enrolling the articles, and had been prevented from so doing for the reasons before mentioned, and for no other; and that he joined the applicant in borrowing the sum of 130*l.* to stamp the articles and pay the penalty, which he did on the 21st *December* instant.

1862.

Ex parte
HERBERT.

Cook Evans, in support of the application.—*Ex parte Bishop* (a) is an authority for granting this application. In that case *Erle C. J.* said, "If the non-payment of the duty was the result of some unforeseen emergency, something over which the party had no control, I should be disposed to assist him; but if the omission was intentional, and part of a scheme to make use of the service under the articles in the event of its proving a promising speculation, I should decline to grant the application." But the application in that case was granted, though there was no "unforeseen emergency;" and the facts were the same as in this case. [*Crompton J. Erle C. J.*, when in this Court, always expressed a strong opinion against relaxing the rule as to payment of the stamp duty at the time of the execution of the articles; he laid it down that applications for that purpose ought not to be granted unless there was some mistake or inadvertence in the non-payment of the stamp duty (b). *Wightman J.* Stat. 19 & 20 *Vict. c. 81. s. 3.* provides a scale of penalties to be paid according to the time within

(a) 9 *C. B. N. S.* 150.

(b) See *Ex parte Williams*, coram *Erle J.* in Bail Court, 3 *Jur. N. S.* 160.

which the articles are brought to be stamped: in that provision the Legislature seems to contemplate that there may be a holding over of the payment of the duty.]

COCKBURN C. J. I think that this application should be acceded to. Stat. 19 & 20 *Vict. c. 81. s. 3.* has altered the law relating to the stamping of articles of clerkship to attorneys. Before the passing of that statute, if the stamp on articles of clerkship had not been affixed within six months from their date, the Commissioners of Stamps were prohibited from afterwards stamping them, even on the payment of a penalty (a). That law is no longer in force; for by sect. 3 of stat. 19 & 20 *Vict. c. 81.* the Commissioners of Inland Revenue, in any case where they shall be directed so to do by the Lords of the Treasury, may stamp the articles upon payment of the duty and of a penalty, according to a graduated scale. In this case the applicant has served the required five years, and the only defect in the articles is the non-payment of the stamp duty at the time of the execution of the articles. The Court has always considered it a duty to protect the revenue; but under stat. 19 & 20 *Vict. c. 81.* the Lords of the Treasury, who are the guardians of the revenue, and we must assume that they are the best judges of the circumstances, have thought fit to allow these articles to be stamped. That statute makes all the difference between this and many previous cases.

Besides this case is on all fours with *Ex parte Bishop (b)*, and, I think, within the principle which governed the decision in that case.

(a) See stat. 7 *G. 4. c. 44. s. 4.*

(b) 9 *C. B. N. S.* 150.

objection to such an application as this before stat. 19 & 20 *Vict. c. 81.* was that, the articles not being properly stamped, the Court, for the protection of the revenue, refused to interfere. That difficulty is obviated by the power which, under stat. 19 & 20 *Vict. c. 81. s. 3.*, the Lords of the Treasury have of ordering the Commissioners of Inland Revenue to stamp articles on payment of a penalty according to a graduated scale, amounting, when four years have elapsed since the date of the articles, to the sum of 50*l.* If the Lords of the Treasury, who are the judges in the matter, are of opinion that loss to the revenue would be obviated by imposing a penalty of 50*l.*, no harm is done to the revenue, and this Court will not interfere with the discretion of the Lords of the Treasury in the matter of revenue.

Ex parte
HERBERT.

Independently of any consideration arising on the statute, *Ex parte Bishop* (a) is a direct authority in favour of the application ; and I rather prefer to decide the case upon that authority.

CROMPTON J. I should be sorry to decide in favour of giving this indulgence under sect. 3 of stat. 19 & 20 *Vict. c. 81.*, without further considering that enactment, together with sects. 8 and 9 of stat. 6 & 7 *Vict. c. 73.*, the statute regulating the admission of attorneys, which is a matter within the jurisdiction of this Court, and sect. 2 of stat. 7 & 8 *Vict. c. 86.* It does not appear to me that the graduated scale of penalties removes the objection to the non-payment of the duty at the time of the execution of the articles. Because, if the articulated clerk were to die or give up his intention of following the

(a) 9 *C. B. N. S.* 150.

profession of an attorney, the revenue would lose the amount of the stamp duty. I should wish to see whether the jurisdiction over this matter is in this Court or in the Lords of the Treasury; and I fear that we are opening a side door for parties to enter into articles upon the speculation that this indulgence will be granted.

But I am not sorry for the decision to which the majority of the Court have come, especially after the decision in *Ex parte Bishop (a)*, in which the application was granted notwithstanding there was no unforeseen emergency, though I think that the ratio decidendi does not apply to this case: *Erle C. J.* points to the distinction between cases in which a sudden emergency has prevented the money from being forthcoming for payment of the stamp duty and cases in which there has been a continued non-payment from other causes. This case looks more like the latter class. The applicant indeed says that he did not know that the articles were not stamped; but the father and son are so intimately connected, that I do not think that is a sufficient excuse. There ought to be an intention in the mind of one of the parties to the articles to pay the stamp duty.

MELLOE J. concurred with COCKBURN C. J. and
WIGHTMAN J.

Application granted.

(a) 9 C. B. N. S. 150.

1862.

LAMB *against* ATTENBOROUGH.Thursday,
January 16th.

1. The Factors' Acts, 6 G. 4. c. 94. and 5 & 6 Vict. c. 39., do not apply to the case of master and servant, and therefore

2. Where a wine merchant gave authority to his clerk to sign delivery orders in his master's name, and receive dock warrants in his own, which he likewise authorized him to pledge for the purposes of the master's business, the clerk having fraudulently deposited some of these dock warrants with a pawnbroker as a security for money *bonâ fide* lent to him: held, that the clerk was not an agent within the Factors' Acts, 6 G. 4. c. 94. and 5 & 6 Vict. c. 39., and consequently, that the merchant was entitled to recover the dock warrants from the pawnbroker.

Factors' Acts,
6 G. 4. c. 94
and 5 & 6 Vict.
c. 39.
Merchant's
clerk.
Dock war-
rants.

THE first count was for the conversion of five dock warrants, three being of the *St. Katherine's*, and two of the *Victoria Docks*.

The second count was in *detinue* for the same.

To both counts the defendant pleaded the general issue, and a traverse of the plaintiff's property in the dock warrants: and to the second count he also pleaded that, before the alleged detention, and after the passing of stat. 5 & 6 Vict. c. 39., one *Alexander Bryant* was an agent within the meaning of that statute, and was entrusted with the possession of the dock warrants, the same then being documents of title to goods within the meaning of that statute; and, being so entrusted as such agent as aforesaid, then *bonâ fide* deposited the same in three several lots with the defendant, to be by him kept as pledges and securities for the repayment to the defendant by *Alexander Bryant*, of three several sums of 60*l.*, 100*l.*, and 44*l.*, then *bonâ fide* lent and advanced by the defendant to *Alexander Bryant*, upon the security of the dock warrants, and also for interest payable by *Alexander Bryant* to the defendant upon the

1862.

LAMB
V.
ATTEN-
BOROUGH.

three several sums thenceforth until the same respectively should be repaid to the defendant ; and the defendant received and had the dock warrants for the purpose and on the terms aforesaid, and neither the plaintiff nor *Alexander Bryant* repaid the three several sums of money &c., or the interest thereon &c., to the defendant &c., wherefore the defendant detained the dock warrants, which was the detention alleged against him.

Issue on all the pleas.

First replication to the fourth plea. That *Alexander Bryant* was not entrusted, within the meaning of the statute, with the possession of the dock warrants.

Second replication to the fourth plea. That when *Alexander Bryant*, being such agent and so entrusted as in the plea mentioned, acted as in that plea mentioned, and deposited the dock warrants with the defendant as in that plea mentioned, he, *Alexander Bryant*, within the meaning of the statute, deviated from the express orders and authority received by him from the owner within the meaning of the statute and of the proviso therein in that behalf of the dock warrants.

Issue on both replications.

On the trial, before *Mellor J.*, at the *London Sittings* after *Michaelmas* Term, 1861, it appeared that the plaintiff was a wine merchant, who had wine lying at the *St. Katherine's* and *Victoria Docks*. He engaged as his clerk *Alexander Bryant*, mentioned in the plea, to whom he gave authority to sign delivery orders in his master's name, and receive dock warrants in his own, which warrants he likewise authorized him to pledge, for the purposes of his master's business. *A. B.* acted on this authority, and signed many delivery orders, usually in his master's name, though in some instances in his own.

A. B., having fraudulently deposited five of these dock warrants with the defendant, who was a pawnbroker, as a security for money *bonâ fide* lent to him, the plaintiff brought the present action to recover them. The defence being that *A. B.* was an "agent entrusted with the possession of goods" within the Factors' Act, 5 & 6 *Vict. c. 39.*, and consequently that the transactions between him and the defendant were protected by that statute, the Judge, reserving leave to the defendant to move to enter a nonsuit on that point, left to the jury to say: Had *A. B.* authority to obtain dock warrants except for his master's business? telling them if he had not he was not an agent within the statute; neither was he such agent if he had deviated from the instructions given him in this respect. The jury found that *A. B.* had pledged the warrants fraudulently, as he had no authority to use them except for the business of his master; and a verdict was returned for the plaintiff for the amount claimed, subject to be reduced to nominal damages on the warrants being given up.

Day moved for a rule nisi to enter a nonsuit, or for a new trial on the ground of misdirection.—If this case had arisen under the Factors' Act, 6 *G. 4. c. 94.*, *Bryant* would clearly not have been an agent within the meaning of that Act; *Phillips v. Huth (a)*. But it depends on the subsequent Factors' Act, 5 & 6 *Vict. c. 39.*, the 1st section of which enacts: "After the passing of this Act any agent who shall thereafter be entrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents, so far as to give validity to any

(a) 6 *M. & W.* 572.

1862.

LAMB
V.
ATTEN-
BOROUGH.

contract or agreement by way of pledge, lien, or security *bonâ fide* made by any person with such agent so entrusted as aforesaid, as well as for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract or agreement shall be binding upon and good against the owner of such goods, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent." The words of this Act are "*any agent*" "entrusted with the possession of goods," and *Bryant* was clearly such an agent. It is true he was a clerk; but he was not in the position of a clerk who has only a ministerial duty to discharge; for he had discretionary power to pledge dock warrants for the use of his employer. This statute ought to receive a liberal construction; for it is a well established principle that the person who does an act whereby another is enabled to do mischief should bear the loss occasioned by it, and here that party is the plaintiff who entrusted *Bryant* to the extent he did. [*Cockburn C. J.* The Factors' Acts were never meant to apply to cases of this kind. The first of them, 4 G. 4. c. 83., is entitled "An Act for the better protection of the property of merchants and others, who may hereafter enter into contracts or agreements in relation to goods, wares or merchandizes intrusted to factors or agents;" and it begins by reciting, "Whereas it has been found that the law, as it now stands, relating to goods shipped in the names of persons who are not the actual proprietors thereof, and to the deposit or pledge of goods, affords great facility to fraud, produces frequent litigation, and proves, in its effects, highly injurious to the interests of commerce

in general.”] This is not a case under that Act. [Blackburn J. In *Wood v. Rowcliffe* (a), *Wigram V. C.* held that the Factors’ Acts, 6 G. 4. c. 94., and 5 & 6 Vict. c. 39., were never understood to apply to other than mercantile transactions.] That was the case of advances made on the security of furniture, used in a furnished house, to the apparent owner who was only the agent.

1862.

LAMB
V.
ATTEN-
BOROUGH.

COCKBURN C. J. No rule ought to be granted: for the direction of the Judge was right, and so was the verdict. I entertain no doubt that this case is not within either of the Factors’ Acts referred to. The relation between the parties here was that of master and servant, not that of principal and agent. *Bryant* being the clerk, and in that sense the servant, of the plaintiff, had authority to sign delivery orders on his behalf, and give them to persons dealing with the plaintiff, in the course of his business; and acting on that authority, he, in fraud of his principal, assigned some away. The plaintiff would of course be concluded by what his servant did by his authority, but he is bound no farther; and consequently, when we find that these dock warrants were parted with by his servant without his authority, they still remain his property, and he is entitled to recover them from the party to whom they were pledged.

CROMPTON J. I entirely agree with my Lord Chief Justice. These statutes contemplate the relation of principal and agent. They perhaps extend a little beyond the case of factors, but still fall short of including that of master and servant.

BLACKBURN J. concurred.

Rule refused.

(a) 6 *Hare*, 183. 191.

3 K 2

1862.

Friday,
January 17th.

BARTLETT *against* WELLS.

Contract.
Infancy.
Replication
on equitable
grounds.
Common Law
Procedure Act,
1854, 17 & 18
Vict. c. 125.
s. 85.

Declaration for goods bargained and sold, and goods bargained, sold and delivered. Plea, infancy. Replication on equitable grounds, that the defendant, at the time of the accruing of the causes of action, with knowledge of his true age, falsely and fraudulently represented to the plaintiff that he, the defendant, was of full age, whereby the plaintiff was induced to enter into the contract and supply the goods. On demurrer, held

1. That the replication was no answer to the plea either at law, or as an equitable replication under sect. 85 of The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.

2. That it was a departure from the declaration.

DECLARATION for goods bargained and sold, and goods bargained, sold and delivered; and for work and labour; and for money paid; and for money due on accounts stated.

Pleas. 1. Never indebted. Issue thereon.

2. That the defendant, at the time of the contracting of the said debt, was an infant within the age of twenty-one years.

Replication to the second plea upon equitable grounds: that the defendant, before and at the time of the accruing of the causes of action in the declaration mentioned, with knowledge of his true age, falsely and fraudulently represented to the plaintiff that he the defendant then was of full age, whereby the plaintiff, then having no knowledge or means of knowledge that the defendant then was not of full age, was induced to make and enter into the said contracts in the declaration mentioned, and to supply the said goods therein mentioned to the defendant; and that, but for such false and fraudulent representations as aforesaid, the plaintiff would not have entered into the said contracts or supplied the said goods, or any part thereof.

Demurrer and joinder therein.

Gibbons, for the defendant.—First, the replication, if treated as a *legal* replication, is a departure from the declaration. “A departure takes place when, in any pleading, the party deserts the ground that he took in his last antecedent pleading, and resorts to another;” *Stephen on Pleading*, p. 32, 6th ed. The declaration is upon a contract. The replication making the liability of the defendant to depend on a false representation, converts the action into an action in tort, which cannot be done; *Manby v. Scott* (a), *Johnson v. Pie* (b), *Jennings v. Rundall*, per Lord *Kenyon* (c), *Green v. Greenbank* (d). [*Cockburn* C. J. Those cases only decided that, if goods are delivered to an infant under a contract, the party who delivered them cannot bring trover or case against him, and are not applicable to a fraudulent representation made by an infant.] The plaintiff has elected to declare on a contract.

Secondly, if the replication is treated as an *equitable* replication, it is bad, because the answer which it sets up to the plea does not shew such an equity as can be pleaded under sect. 85 of The Common Law Procedure Act, 1854, 17 & 18 *Vict. c.* 125. In *Johnson v. Pie* (b) it was held that an infant could not be made liable for a fraudulent representation that he was of full age, whereby the plaintiff was induced to contract with him; and the reason given in the report in 1 *Keb.* 914. against an action being maintainable on the affirmation by the defendant that he was of full age is, that “also by this means all the pleas of infancy would

(a) 1 *Sid.* 109, 129.

(b) 1 *Keb.* 905, 913; 1 *Lev.* 169; *S. C. nom. Johnson v. Pye*, 1 *Sid.* 258.

(c) 8 *T. R.* 335, 336.

(d) 2 *Marsh.* 485.

1862.
BARTLETT
v.
WELLS.

be taken away, for such affirmations are in every contract." The correctness of that decision was recognised by Parke B. in *Price v. Hewett* (a). In *The Liverpool Adelphi Loan Association v. Fairhurst and Wife* (b) it was held, for a similar reason, that the husband could not be made liable in an action against him and his wife for a fraudulent representation by the wife that she was sole and unmarried at the time of making the contract, for, "if this were allowed, it is obvious that the wife would lose the protection which the law gives her against contracts made by her during coverture."

Beasley, contra.—The replication is good as an *equitable* replication. The decisions in Courts of equity have established it as an equitable doctrine that an infant who obtains a loan on a representation, which he knows to be false, that he was of age, is estopped from pleading his infancy; *Ex parte The Unity Joint Stock Mutual Banking Association, In re King* (c), *Cory v. Gertcken* (d), *Watts v. Creswell* (e), *Clarke v. Copley* (f), *Bristow v. Eastman* (g). [Crompton J. *Bristow v. Eastman* was not an action on an actual contract.] *Watts v. Creswell* (e) is cited in *Savage v. Foster* (h), p. 38; and it is said, in note b, "That an infant who is privy to or practises a fraud shall be bound in the same manner as if he had been adult." [Crompton J. In *Bullen and Leake's Precedents of Pleadings*, which contains a very convenient and well arranged collection of rules as to when a defence on equitable grounds may be pleaded, it

(a) 8 *Exch.* 146. 148.

(b) 9 *Exch.* 422. 429.

(c) 3 *De G. & Jones*, 63.

(d) 2 *Madd.* 40.

(e) 2 *Eq. Cas. Abr.* 515, 516, pl. 3; 9 *Vin. Abr.* 415, tit. *Infant*, pl. 24.

(f) 2 *Cox Eq. Cas.* 173.

(g) 1 *Esp.* 172.

(h) 9 *Mod.* 35.

is laid down, page 332, note (a): "Equitable replications will not be allowed which are inconsistent with the legal right alleged in the declaration." And, after citing the instances in *Hunter v. Gibbons* (a) and *Gulliver v. Gulliver* (b), they add: "These replications are objectionable, both as being departures from the declaration and as setting up matter for a suit in equity instead of a cause of action at law." This replication is contrary to both of the rules there laid down.] In p. 353, note (a), it is said, "In an action brought upon the contract, the representation might perhaps in some cases form a good replication upon equitable grounds to a plea of infancy." [Crompton J. That suggestion is thrown out very gently.] By sect. 85 of The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125., "the plaintiff may reply, in answer to any plea of the defendant, facts which avoid such plea upon equitable grounds." It was intended by this and the preceding sections to give parties the benefit of an equitable answer or defence without incurring the expense or inconvenience of going into a Court of equity. [Cockburn C. J. But it was not intended to invest a Court of common law with power to give relief in all cases in which a Court of equity would give it. If this Court could not give redress when all the facts were stated in the declaration, it was not intended that redress should be given by an equitable replication.] In *De Pothonier v. De Muttos* (c) Lord Campbell said that "the object of sect. 85 of The Common Law Procedure Act, 1854, was to allow an equitable replication to a plea which sets out facts that can be answered upon equitable grounds: such a plea, in fact, as the Court

(a) 1 H. & N. 459.

(b) 1 H. & N. 174.

(c) E. B. & E. 461. 466.

would, before the statute, have set aside in the exercise of what was called its equitable jurisdiction." [Crompton J. Wherever there is want of good faith in pleading a plea, we have jurisdiction to set it aside independently of the Common Law Procedure Act, 1854. The replication in *De Pothonier v. De Mattos* (a) did not set up a new equitable right, nor was it a departure from the declaration, but it alleged that the plaintiff, having a legal right to sue for another person, had given a release; though I remember thinking that the decision in that case went too far. In this case the replication does not avoid the plea, but says, in effect, "If I had added a certain fact in my declaration, a Court of equity would have relieved me." In *Vorley v. Barratt* (b) it was held that an equitable replication might be a good legal as well as equitable answer to a plea. [Cockburn C. J. A Court of equity might say to the defendant, "You shall not set up infancy;" this Court cannot prevent him from pleading a plea of infancy: or a Court of equity might say to the plaintiff, "We will give you leave to amend your bill by setting out all the facts," which this Court cannot do. Crompton J. Is there any case in which a Court of equity has interfered to prevent the defendant from pleading his infancy?] No. *Nelson v. Stocker* (c) may be cited, but there the facts did not raise the equitable doctrine.

Gibbons was not called upon to reply.

COCKBURN C. J. I am of opinion that the replication affords no answer to the plea either at law or in equity.

(a) *E. B. & E.* 461.

(b) 1 *C. B. N. S.* 225.

(c) 4 *De G. & Jones*, 458.

As to the first, the test is whether, upon the whole of the facts, taking the declaration, plea and replication together, the plaintiff makes out a cause of action against the defendant. The state of facts, so taken, is that the defendant, being a minor, represented himself to the plaintiff as a person of full age, and by that representation induced the plaintiff to enter into a contract with him, which he has failed to perform. If these facts were stated in extenso in the declaration, could the action be maintained? Clearly not. Therefore the replication affords no legal answer to the plea.

Again, the facts stated in the replication would not be an answer if infancy were pleaded to a bill in equity for a specific performance of the contract. It may be that a Court of equity would afford relief against a fraud of this nature on the part of an infant; but that would be only on the ground of fraud, not on the ground of contract. In the cases cited the suit was against the infant, in respect of a fraud, and redress was given against him because he had been guilty of fraud. Therefore those cases do not shew that fraud is an answer to a plea of infancy, which, both at law and in equity, avoids a contract except for necessities; though a Court of equity would compel the infant to make restitution or do equity.

Moreover, the replication is a departure. The declaration is on a contract for money payable for goods supplied to the defendant; the plea answers that: the plaintiff seeks to put the plea aside by replying a tort. That is a departure, the nature of the cause of action being changed.

CROMPTON J. It is clear that if this had professed to be a replication based upon legal, and not upon equitable

grounds, it would not prevent the defence pleaded by the plea from being applicable to the action. It is clear on the authorities, both as to coverture and infancy, which stand on the same footing, that, whenever a tort is connected with a contract made with a married woman or an infant, it does not prevent them from pleading their incapacity to contract. The case of *Wright v. Leonard* (a) is a strong authority on this point. My brothers *Williams* and *Willes*, who differed from the rest of the Court in holding that there was a cause of action against the husband and wife, admitted that a married woman is exempted from liability for fraud where it is directly connected with a contract made with her, and is the means of effecting it, and part of the same transaction, which is the principle of the decision in *The Liverpool Adelphi Loan Association v. Fairhurst and Wife* (b); though they disputed the application of the principle to that case on the ground that there had been no contract with the wife. That therefore is a strong authority that the replication would be a departure if set up as avoiding the plea.

Then is it matter which may be set up, in a replication upon equitable grounds, under sect. 85 of The Common Law Procedure Act, 1854? I think not. I adhere to the rule stated by Mr. *Bullen* and Mr. *Leake* in the passage which I have read (c); and I think that this replication would be a departure in equity as well as law, because the matter it sets up is an equitable right compounded of tort and contract. This is not matter on which the plaintiff might have gone into a Court of equity. There have been cases in which a Court of equity has

(a) 11 C. B. N. S. 258.

(b) 9 Exch. 422.

(c) See p. 839.

acted in the exercise of its peculiar jurisdiction as to fraud, which is different from that in our Courts ; but we are not to act as a Court of equity in enforcing mere equitable rights. The nearest case to this is *Vorley v. Barratt* (a), where the plaintiff sued for contribution as surety; the replication did not substitute a new right and alter the original liability, but set up a subsequent discharge. The answer to the plea there was that there was a mistake or collusion, which is different from setting up an answer which goes to a different course of action. I think that the rule is that an equitable replication cannot be pleaded to a legal plea if it merely shews that the plaintiff has some right in equity, which is ground for applying to a Court of equity.

Also the replication is bad as a departure, which is an objection open on general demurrer (though there has been some doubt as to that), because it sets up a tort, the original cause of action being a contract.

MELLOR J. I am of the same opinion. An equitable ground is relied upon in the replication, and one which is matter for a suit in a Court of equity : that is not within sect. 85 of The Common Law Procedure Act, 1854.

I am also of opinion that the replication is a departure : and therefore, on both grounds, the demurrer ought to be allowed.

Judgment for the defendant.

(a) 1 C. B. N. S. 225.

Monday,
January 20th.

Ex parte WOOLDRIDGE.

*Friendly
Society.
18 & 19 Vict.
c. 63. ss. 41, 42.
Jurisdiction
of County
Court.*

Rule 16 of a friendly society provided, that a dispute of any kind whatsoever arising under the rules should be referred to a committee. By rule 22, any member in the receipt of the gifts of the Society being found imposing on the Society was to be expelled. A member of the Society in the receipt of pay was charged with receiving full pay when he was only entitled to half pay, and, the matter being referred to a committee under rule 16, he was expelled, but without being heard before the committee. Upon application for a mandamus to reinstate him as a member of the Society,

1. Held by *Crompton, Blackburn and Mellor JJ., Cockburn C. J.* dubitante, that the County Court had jurisdiction, under stat. 18 & 19 Vict. c. 63. ss. 41, 42, to order him to be reinstated, if he had been improperly expelled.

2. *Quere*, whether this was a dispute within rule 16; but, if it was, held that the County Court might order the Society to hear the applicant.

THIS was an application for a rule calling upon the *Loyal Nelson Lodge* of the Midland Counties Order of Odd Fellows, held at *Woodside*, in the county of *Worcester*, being a duly registered Friendly Society, to shew cause why a mandamus should not issue commanding the Society to reinstate *George Wooldridge* as a member of the Society, upon service of the rule on the secretary of the Society. The applicant became a member of the Lodge on the 15th *November*, 1841. In *August*, 1860, he became blind, and under the rules of the club he was entitled to 7*s.* a week for six months and 3*s.* 6*d.* a week afterwards. He applied for and received his sick pay at the rate of 7*s.* a week until the 22d *April*, 1861. It was then discovered that he had unintentionally received full pay for seven weeks longer than, according to the rules, he ought to have received it, and he repaid the excess to the treasurer on the 6th *May*. Payments at the reduced rate of 3*s.* 6*d.* a week were made to the applicant from that time until the 13th *August*, when his daughter, upon going as usual for the sick pay, was

1862.

 Ex parte
 WOOLDRIDGE.

told by the secretary that orders had been given to pay no more, because she had received from the treasurer a full week's pay on the 6th *May*, when the money received in excess was repaid; and that, for that reason, the applicant had been expelled from the Lodge. The applicant was required to attend with his daughter, on the Lodge night, on the 26th *August*. They did so, and were not allowed to go into the Lodge meeting-room; but some of the members came out and repeated that he had received too much, and at the close of the evening they informed him that they did not intend to pay him any more. In answer to a letter by the attorney of the applicant, demanding his pay, one of the trustees wrote, on the 5th *September*, 1861, as follows:—"Wooldridge's case, of the Lodge of which I am trustee, has been heard before two committees, and then referred to the whole Lodge according to rule 16; and it was clearly proved that he had received moneys unlawfully in receiving whole pay when he should only have received half pay, and that, after returning some of the moneys that he had received, he again sent, and they received the full amount again, which they must well know that they were doing wrong." On the 7th *October*, which was the usual club quarter night, the applicant tendered his quarter's money, when the officer who received the members' payments, one of the trustees, said that they would not receive it: they had crossed his name out of the books.

The rules of the Society were duly certified and enrolled under stat. 18 & 19 *Vict. c. 63*. The following were referred to.

"6. That this Lodge shall consist of an unlimited number of members; the business thereof shall be con-

1862.

Ex parte
WOOLDRIDGE.

ducted by a committee of management, consisting of the following officers, viz.," &c. ; "that five shall form a quorum. The meetings shall be held every third *Monday*, at half-past seven o'clock in the evening, and continue open until ten o'clock, when it shall be closed for the evening. That every member of the Lodge shall have an equal voice in all property and concerns thereof, and when, at any time, the votes are equal, the president shall have the casting vote."

" 16. That if a dispute arise, under the rules, in the Lodge, of any kind whatsoever, which they cannot conveniently settle, they must refer the same to a private committee, and, if the same be not settled by them to mutual satisfaction, it shall then be referred to the district committee, and their decision shall be final."

" 22. That any member in the receipt of the gifts of this Lodge being found imposing thereon by stating himself sick and incapable of following his employment, usual trade or calling, when he is able, or actually doing so, shall be expelled," &c.

" 39. If any officer, member, or any person whatever, by false representation or imposition, shall obtain possession of any moneys, securities, books, papers or other effects of this Society, or, having the same in his possession, shall withhold or misapply the same, or shall wilfully apply any part of the same to purposes other than those expressed or directed in the rules, he may, upon complaint made by any person on behalf of this Society, be summoned before two justices, and if the justices shall determine the complaint to be proved, they shall adjudge and order him to deliver up all such moneys, securities, books, papers or other effects, or to repay the amount of money applied improperly, and to

pay, if they think fit, a further sum of money not exceeding 20*l.*, together with costs not exceeding 20*s.*; and, in default, the said justices may order the said person so convicted to be imprisoned in the common gaol or house of correction, with or without hard labour, for any time not exceeding three months."

1862.

 Ex parte
 WOOLDRIDGE.

J. E. Davis, in support of the application.—It is doubtful whether this is a dispute over which the county court has jurisdiction. Stat. 18 & 19 *Vict. c. 63. s. 40.* enacts: "Every dispute between any member or members of any society established under this Act or any of the Acts hereby repealed, or any person claiming through or under a member, or under the rules of such society, and the trustee, treasurer, or other officer, or the committee thereof, shall be decided in manner directed by the rules of such society, and the decision so made shall be binding and conclusive on all parties, without appeal: Provided that where the rules of any society established under any of the Acts hereby repealed shall have directed disputes to be referred to justices, such disputes shall, from and after the 1st *August*, 1855, be referred to and decided by the county court as hereinafter mentioned." The proviso taking away the jurisdiction of the justices was repealed by stat. 21 & 22 *Vict. c. 101. s. 5.*, and their jurisdiction to decide disputes is restored, if the rules so direct. By stat. 18 & 19 *Vict. c. 63. s. 41.*: "All applications for the removal of any trustee, or for any other relief, order, or direction, or for the settlement of disputes that may arise or may have arisen in any society the rules of which do not prescribe any other mode of settling such disputes, shall be made to the county court of

the district within which the usual or principal place of business of the society shall be situate ; and such court shall, upon the application of any person interested in the matter, entertain such application, and give such relief, and make such orders and directions in relation to the matter of such application, as hereinafter mentioned, or as may now be given or made by the Court of Chancery in respect either of its ordinary or its special or statutory jurisdiction." In this case, rule 16 directs that disputes between a member and the Society shall be determined by a private committee ; a reference under that rule has taken place, and the Society have proceeded to expel the applicant. But the applicant has never been heard, and rule 22, which provides for the expulsion of a member in certain cases, is not applicable to this case. If fraud is alleged, proceedings should be taken under rule 39, or sect. 24 of stat. 18 & 19 Vict. c. 63. [*Blackburn J.* Does not sect. 41 provide for disputes as to whether a member has been rightly expelled? Sect. 42 gives power to the county court judge to adjudge the restoration of a member : it enacts : "where the order of the said court shall be for the doing of some act, not being for the payment of money, it shall be lawful for the judge of such county court in his said order to order the party to do such act," &c. *Cockburn C. J.* If the Society have taken upon themselves to expel a member, I doubt whether the county court has jurisdiction : it would be an answer that the applicant was not a member.] Stat. 10 G. 4. c. 56. s. 27. enacted that provision should be made by the rules of the Society specifying whether disputes should be referred to justices or to arbitration ; and, in the former alternative, jurisdiction being given by sect. 28

to justices to determine disputes, this Court has frequently interfered by mandamus to compel justices to entertain applications by persons thinking themselves aggrieved. [*Blackburn J. Re Hoey v. M'Farlane* (a) decides that stat. 18 & 19 Vict. c. 63. s. 41. gives the county court all the remedial powers previously possessed by the Court of Chancery.]

COCKBURN C. J. The first question is whether the expulsion was not altogether idle and vain, inasmuch as, on the facts stated, there was no ground for expulsion. It is also a question whether the matter was a dispute which could, by the 16th rule, be referred to the committee. If it was, the committee do not appear to have acted judicially, but only to have reported. If there was no expulsion, the matter would be the ground of an application to the county court. And, if the committee have not heard the applicant, he could get an order of the judge of the county court on them to hear him.

My brothers, however, have no doubt that the county court has jurisdiction to order that the applicant be reinstated if he has been improperly expelled; and there is an authority to that effect. That being so, this Court has no jurisdiction.

When the judge of the county court has made that order, if the pay is still withheld, he should inquire into that; and, if the dispute was within the 16th rule, he should direct the Lodge to hear the applicant according to that rule, or, if not within the rule, he should decide the case and give relief.

CROMPTON, BLACKBURN and MELLOR JJ. concurred.

Rule discharged.

(a) 4 C. B. N. S. 718.

1862.

The QUEEN, on the prosecution of GREGORY,
against ALLEN.

Monday,
January 20th.

Indictment.
Nolle pro-
sequi.
Power of
Attorney
General.

1. The Attorney General has power to enter a nolle prosequi on an indictment without calling upon the prosecutor to shew cause why that should not be done ; and where he has done so this Court will not interfere.
2. *Quere*, whether the nolle prosequi has the effect of putting an end to the prosecution altogether ?

INDICTMENT charged that the defendant, on the 13th *September* instant, at the Custom House, in the city of *London*, unlawfully, wilfully, knowingly and corruptly did give certain false evidence on his examination on oath before *Ralph William Grey Esq.*, one of the Commissioners of Her Majesty's Customs, then conducting a certain inquiry under and in pursuance of sect. 38 of The Supplemental Customs Consolidation Act, 1855 (18 & 19 *Vict. c. 96.*), and thereby unlawfully and knowingly did commit wilful and corrupt perjury, contrary to the statute, &c.

A true bill having been found at the *October Sessions* of the Central Criminal Court in 1861, the indictment was removed into this Court by certiorari at the instance of the defendant ; and, on the 26th *November* following, a nolle prosequi was entered in pursuance of an order of the Attorney General, addressed to the Queen's coroner and attorney ; which, after reciting that an indictment had been found at the Central Criminal Court against the defendant for alleged perjury, which was removed by certiorari into this Court, proceeded : " And whereas it is deemed advisable that a nolle prosequi should be entered to the said indictment. These

are therefore to authorize and require you to enter, or cause to be entered, a nolle prosequi to the said indictment.

1862.

The QUEEN
v.
ALLEN.

"Dated this 26th day of *November*, 1861.

"*W. Atherton.*"

J. J. Powell, on behalf of the prosecutor, moved, upon affidavits, for a rule calling upon the defendant to shew cause why the prosecutor should not be at liberty to proceed to the trial of the indictment, notwithstanding the nolle prosequi.

First, the nolle prosequi has been entered irregularly; and therefore the indictment is still in force. The Attorney General has no power to enter a nolle prosequi without calling the prosecutor before him and hearing the parties. In *The Crown Circuit Companion*, 9th ed., p. 22, 10th ed. by *Ryland*, p. 25, it is said that if the defendant has an action brought against him for the same offence of which he stands indicted, he may apply to the Attorney General for a nolle prosequi to be entered on the indictment, and must first procure a certificate from the clerk of the peace of the substance of the indictment, which must be annexed to a proper affidavit, "whereupon the Attorney General will grant a summons, directed to the prosecutor, to attend him on such a day, to shew cause why a nolle prosequi should not be entered on such indictment." [*Crompton J.* That is only done by the Attorney General for his own information; but he may enter a nolle prosequi in Court. *Blackburn J.* The Attorney General has the same right to enter a nolle prosequi on behalf of the Crown as a plaintiff has in a civil suit.] In

1862.
 The QUEEN
 v.
 ALLEN.

2 *Gude's Practice of the Crown Side of the King's Bench*, p. 550, it is said: "The application for a nolle prosequi must be by petition to the Attorney General, stating the facts; but where it is for a public offence he will not interfere. *Rex v. Evelyn and others*, Trin. Vacation, 1820. In order to procure a nolle prosequi to stay proceedings upon an information or indictment, at the instance of a defendant, an affidavit of the circumstances must be made, and a summons to shew cause obtained from the Attorney General, which may be attended by counsel; and upon hearing what is alleged an order is granted or refused" (a). [*Cockburn C. J.* It is not said that the Attorney General cannot grant his fiat without hearing the parties. *Crompton J.* When the prosecutor wants to stop a prosecution for a public offence it is a rule of practice, for fear of collusion, that he must do it through the Attorney General.] The Crown may pardon before inquiry, but the Attorney General has not this power of preventing inquiry.

Secondly, assuming that the Attorney General has power to enter a nolle prosequi without hearing the parties, the nolle prosequi is only a temporary stay of proceedings; and it is competent for the Court to order the prosecution to proceed, without putting the prosecutor to the expence of a fresh indictment. [*Cockburn C. J.* The Attorney General might enter a nolle prosequi toties quoties.] From respect to this Court he would not do so. [*Cockburn C. J.* He would, as a public officer, act upon his own responsibility.] And this Court would also act upon its sense of the justice of the case. In *Goddard v. Smith* (b) *Holt C. J.* said,

(a) See 1 *Chitt. Crim. Law*, p. 478, 479, 2d ed.

(b) 6 *Mod.* 261, 262.

1862.

The QUEEN
v
ALLEN.

“that the entering a nolle prosequi was only putting the defendant sine die, and so far from discharging him from the offence, that it did not discharge any further prosecution upon that very indictment, but that, notwithstanding, new process might be made out upon it.” And “this here is not so much as a nonsuit, for the indictment stands still in force, and the Attorney General must [might] make new process upon it when he pleases.” *Powell J.* “doubted of the effect of a nolle prosequi upon an indictment, whether it discharged the indictment, or only put the defendant without day, and that notwithstanding the Attorney General might issue new process upon it;” and then the report continues: “*Holt C. J.* said that he had known it thought very hard that the Attorney General should enter nolle prosequi upon indictments, and that it began first to be practised in the latter end of King *Charles* the Second’s reign;” and he ordered precedents to be searched. “*Harcourt*, master of the office. There never has been any proceedings after a nolle prosequi.” “*Holt C. J.*, at another day, declared, that in all King *Charles* the First’s time there is no precedent of a nolle prosequi on an indictment.” And in *The Queen v. Ridpath* (a) it was said by the Court, p. 153, “that the nolle prosequi was neither a bar nor discharge.” [*Blackburn J.* That seems to be a rather loose note.] In *Wallace’s Reporters*, 3d ed., p. 227, the 6th and 10th *Modern* are mentioned among those volumes of *Modern Reports* which “deserve a place in the better class of the old reporters.” [*Blackburn J.* In *The Queen v. Ridpath* (a) the point was that the nolle prosequi was not a termination of the proceedings: it was immaterial to the question before the Court whether the prosecution

(a) 10 *Mod.* 152.

1862.
The QUEEN
v.
ALLEN.

might be continued by a fresh indictment.] In *Stretton and Taylor's Case* (a), which was an information upon the Statute of Usury, it was held that a nolle prosequi was no bar against the informer.

COCKBURN C. J. I am of opinion that there ought to be no rule in this case. It is an undoubted power of the Attorney General, as representative of the Crown in matters of criminal judicature, to enter a nolle prosequi, and thereby to stay proceedings in any indictment or criminal proceeding. No instance has been cited, and therefore it may be presumed that none can be found, in which, after a nolle prosequi has been entered by the fiat of the Attorney General, this Court has taken upon itself to award fresh process or has allowed any further proceedings to be taken on the indictment. Nor, if the Court were to take that unprecedented course, is there anything to prevent the Attorney General from entering a nolle prosequi toties quoties. It is not for us to create a precedent which is contrary to the established practice, and which would be fraught with great inconvenience. Our attention has been called to the practice of Attorney General in his office, as laid down in the books, to summon the prosecutor, and hear the parties before granting his fiat for a nolle prosequi. I think that is a wholesome practice; and generally the law officer of the Crown, before entering a nolle prosequi either ex mero motu or at the instance of the defendant, and thereby debarring the prosecutor from proceeding further, would act wisely in calling the prosecutor before him; but, from particular circumstances known to him, or from the nature of the charge, he may feel called upon to grant his fiat for a

(a) 1 Leon, 119.

nolle prosequi without adopting that course. Suppose it possible that there could be an abuse of his power by the Attorney General, or injustice in the exercise of it, the remedy is by holding him responsible for his acts before the great tribunal of this country, the High Court of Parliament. I have no doubt that the Attorney General has this power; and this Court has never interfered with it.

1862.

The QUEEN
V.
ALLEN.

CROMPTON J. It would be very mischievous, by granting a rule nisi, to raise any doubt in so clear a matter. In this country, where private individuals are allowed to prefer indictments in the name of the Crown, it is very desirable that there should be some tribunal having authority to say whether it is proper to proceed farther in a prosecution. That power is vested by the constitution in the Attorney General, and not in this Court. The Attorney General may enter a nolle prosequi ex mero motu. The practice, that there should be a summons to the prosecutor to shew cause why the Attorney General should not grant his fiat, is generally satisfactory, but he is the judge whether a nolle prosequi should be entered, and there is nothing in the books to shew that he cannot do it without hearing the parties. Moreover, there is nothing in this case to shew that we ought to interfere if we had the power.

Then, the nolle prosequi being on the record, there is an end of this prosecution; but the question remains whether that is final or not. I rather think, however, that Mr. *Archbold*, in his *Practice of the Crown Office*, is right, when he says, p. 62, that it "has the effect of putting an end to the prosecution altogether." It is said that, notwithstanding

1862.

 THE QUEEN
 V.
 ALLEN.

that the Attorney General may interfere in any prosecution in any Court in *England*, and stop it, this Court may afterwards award process. *Goddard v. Smith* (a) only decided that the entry of a nolle prosequi is not a decision on the merits of the prosecution: the Court, in the course of the argument, said that the Attorney General might issue new process upon the indictment; but, as I have said, I rather think the nolle prosequi puts an end to the prosecution. In *Stretton and Taylor's Case* (b) the prosecutor was claiming something for himself as well as for the Crown: and the Attorney General could not, by entering a nolle prosequi, take away the right of the informer. In *The Queen v. Ridpath* (c) there was a mistake in the pleading, and, upon another information being exhibited against the defendant, the Court had to consider what was the effect of a nolle prosequi on the recognizances entered into by the defendant and his sureties, and they held that the nolle prosequi was not a discharge; but they must have held that the original information was at an end; because there cannot be two prosecutions against a man for the same offence at the same time: that is contrary to what the Court said in *Goddard v. Smith* (a). The Attorney General has this power, and if he misuses it this Court cannot interfere.

BLACKBURN J. I do not express an opinion whether, after a nolle prosequi has been entered, the prosecutor can proceed with a fresh indictment. But the power of determining whether the prosecution of an indictment shall go on or not, is entrusted to the Attorney General, who

(a) 6 *Mod.* 261, 262.

(b) 1 *Leon.* 119.

(c) 10 *Mod.* 152.

is the great law officer of the Crown ; and whether he is right or wrong this Court cannot interfere.

1862.

The QUEEN
v.
ALLEN.

MELLOR J. I am of the same opinion. If we were to interfere in the manner suggested, a serious conflict might arise between the jurisdiction of this Court and the functions of the Attorney General.

Rule refused.

JACKSON *against* EVERETT.

Monday,
January 20th.

1. Stat. 43 G. 3. c. 46. s. 4., by which "in all actions upon any judgment recovered the plaintiff shall not recover costs of suit" unless by order of the Court or a Judge, does not apply where a count for another cause of action is joined with a count upon a judgment.

Action on
judgment.
Costs.
43 G. 3. c. 46.
s. 4.

2. Action upon a judgment and for use and occupation. To the count on the judgment the defendant pleaded nul tiel record, and to the count for use and occupation brought money into Court, which the plaintiff accepted in satisfaction. Held, that the plaintiff, having succeeded on both causes of action, was entitled to costs on both without an order of the Court or a Judge.

THE first count of the declaration was upon a judgment recovered by the plaintiff against the defendant for a debt of 12*l.* 10*s.* 6*d.* and 4*l.* 1*s.* costs: there were also counts for use and occupation of a dwelling house, and upon accounts stated.

The defendant pleaded to the first count that there was no record of the supposed judgment; and as to the second and third counts, he brought 9*l.* into Court, which the plaintiff accepted in satisfaction.

Issue was joined on the first plea; and on the trial, the record in the cause of *Jackson v. Everett* being

1862.

JACKSON

V.

EVERETT.

produced, judgment was ordered to be entered for the plaintiff, and he signed judgment for 16*l.* 11*s.* 6*d.*

At the attendance before the Master, pursuant to a notice to tax the plaintiff's costs, the defendant's attorney objected to the Master's authority to tax the costs, on the ground that, this action being on a judgment, the plaintiff was not entitled to recover his costs without the order of the Court, and that no such order had been made. But the Master stated, that as this action was partly on a judgment recovered, and partly on a separate cause of action, and the plaintiff had recovered the whole amount claimed, he had power, according to two decisions recently made by *Bramwell* B., after consulting other Judges, under similar circumstances, to tax the costs, and he accordingly taxed them and made his allocatur for 12*l.* 17*s.* 6*d.* It further appeared that the action in which judgment was recovered was brought to recover 36*l.* due for rent, on account whereof the defendant paid 27*l.*; that he afterwards called at the office of the attorneys for the plaintiff for the purpose of paying the balance of the debt and costs in the first mentioned suit, when they informed him that judgment had been signed in the action, and claimed 16*l.* 11*s.* 6*d.* the amount of such judgment, and 1*l.* 5*s.* for a writ of execution issued on the judgment, which he declined to pay, on the ground that there was only 9*l.* due in respect of the debt, and the costs had been unnecessarily incurred.

In *Michaelmas* Term, 1861,

Gibbons obtained a rule calling upon the plaintiff to shew cause why the Master's allocatur should not be

set aside or varied, so far as it related to the costs of the action on the judgment and of the issue relating to the plea of nul tiel record, on the ground that there was no rule or order allowing costs. He cited *Adams v. Ready* (a).

1862.

JACKSON
v.
EVERETT.

Raymond shewed cause.—This is not an action upon a judgment within stat. 43 G. 3. c. 46. s. 4., which enacts, “that in all actions which shall be brought in *England* or *Ireland*, from and after the said 1st day of *June* in the said year of our Lord 1803, upon any judgment recovered, or which shall be recovered, in any Court in *England* or *Ireland*, the plaintiff or plaintiffs in such action on the judgment, shall not recover or be entitled to any costs of suit, unless the Court in which such action on the judgment shall be brought, or some Judge of the same Court shall otherwise order.” That applies only to an action upon a judgment simpliciter. The section in its terms extends to judgments recovered at the time of the passing of the Act, and the legislature could not have intended to deprive parties of a vested right to costs, which a plaintiff then had, if the action included other matters besides the judgment. [*Crompton J.* Suppose the plaintiff put into his declaration upon a judgment a count for the consideration of the judgment, would not that be an evasion of the statute?] In that case there would not be two distinct causes of action, because the latter would merge in the former. [*Cockburn C. J.* May not each count in this declaration be treated as a separate action? *Crompton J.* If the declaration is taken divisim, the plaintiff might apply to the Court or a Judge for an order for costs on the

(a) 6 H. & N. 261.

1862.

 JACKSON
 v.
 EVERETT.

count upon the judgment.] There is only one writ, and the costs are general.

Gibbons, contra. The plaintiff seeks to evade the enactment in stat. 43 G. 3. c. 46. s. 4. [He referred to the facts stated in the affidavits.] [*Crompton J.* Whether the plaintiff is entitled to these taxed costs or not arises on the record, and we cannot take the facts into consideration.] As far as regards the first count, this is not less an action upon a judgment because judgment in it is recovered for something else. In *Bell v. Waldron (a)*, where the plaintiff obtained the benefit of execution against the defendant's person by suing on two judgments and so recovering upwards of 20*l.*, *Wightman J.* considered that the plaintiff, though he had not been guilty of improper evasion of stat. 7 & 8 Vict. c. 86. s. 57., ought not to be allowed his costs. The legislature intended, by sect. 4 of stat. 43 G. 3. c. 46., that a person against whom a judgment had been recovered should not be harrassed by a fresh action on the judgment and costs; and the section may be read as if the words "in respect of such action" were in it after the words "the plaintiff in such action on the judgment shall not recover or be entitled to any costs of suit." In *Wood v. Silletto (b)*, which was an action upon a judgment composed partly of an original demand, bearing interest under an agreement between the parties, and the remainder of money due upon simple contract, an application to allow the defendant to pay the amount of the debt into Court without costs was refused. [*Blackburn J.* In 1819, when that case was decided, no plea of payment of money into Court could be pleaded: the case is loosely

(a) 9 Jur. 510.

(b) 1 Chitt. 473.

reported. *Cockburn C. J.* It amounts to no more than this, that the defendant wanted to pay into Court the amount of the judgment without interest, which the plaintiff refused to accept, and the Court said they could not accede to that application, because, if they did, it would exclude the consideration of the question whether the plaintiff was or was not entitled to interest, and therefore the cause must go on.]

COCKBURN C. J. I am of opinion that this rule ought to be discharged. Section 4 of stat. 43 G. 3. c. 46., which is relied on by the defendant in support of the rule, enacts: [His Lordship read the section.] In this case the declaration contains a count upon a judgment, and a count for use and occupation; and it is contended that the action is not within the terms of sect. 4, because it is not an action on the judgment merely, but an action of assumpsit, with a count added on the judgment. The case is certainly not strictly within the terms of the enactment; and I think, though not without having had some doubt in the course of the argument, that we cannot carry the words of the enactment further than they import. It is true that the construction contended for by Mr. *Raymond* affords a plaintiff an opportunity of taking the case out of the statute by adding to a count upon a judgment a count on some other cause of action, and so the statute may be improperly evaded; but when that abuse is shewn to exist, it may be redressed by an application to the equitable jurisdiction of the Court. On the other hand, the defendant may protect himself from the costs of the action either by paying into Court the amount sought

1862.

JACKSON
v.
EVERETT.

to be recovered in the count upon the judgment, or by letting judgment go by default as to that count; in which case the costs would be comparatively little or nothing. And it is obvious that the defendant against whom an action is brought, not only upon the judgment but on the other cause of action, is not placed in a worse situation than he would be in if separate actions were brought; because, by having only one action brought against him, he is saved from the costs of a double execution.

I do not decide this rule upon the merits of the case, because it is a matter of law; but I advert to the facts as illustrating the grounds of expediency which are in favour of our decision. It is plain that the defendant sought by a cunning device to bring himself within sect. 4 of stat. 43 *G. 3. c. 46.*, and so deprive the plaintiff of any claim for costs. The plaintiff was sued on a judgment and on a cause of action in assumpsit; he could not dispute that 16*l.* was due on the judgment; and he admitted that 9*l.* was due on the count in assumpsit. When he did not succeed in stopping the action by an offer to pay 9*l.* and costs, he pleaded noli record, and paid 9*l.* into Court. As the 16*l.* was justly due, the defendant might have relieved himself from further proceedings by payment of that sum, and therefore it is clear that while there may be an abuse on the one hand which may be corrected, on the other hand, if we were to adopt the construction of the statute contended for by Mr. *Gibbons*, considerable abuse might be committed by defendants where a count on a judgment is added to a count on another cause of action.

Upon the whole, I think we shall do best by adhering

to the strict letter of the statute ; more especially as we learn from my brother *Crompton*, who has had communication with my brother *Bramwell*, that that view has been acted on at Chambers.

1862.

JACKSON
v.
EVERETT.

CROMPTON J. I also have entertained considerable doubt upon this point. As far as authority goes, it is in favour of the plaintiff's construction of sect. 4 of stat. 43 G. 3. c. 46. My brother *Bramwell*, after consulting one or two of his brethren, has so decided at Chambers, and I have followed that decision. Moreover, the words of the section "In all actions upon any judgment," *primâ facie*, mean actions on a judgment, and nothing else. The intention of the legislature seems to have been to put a penalty on a plaintiff proceeding upon a judgment by a fresh action when he might have the fruits of the first action by taking out execution upon the judgment. It should, however, be remembered, that when the Act passed the action upon a judgment could only be an action of debt, and very few causes of action could be joined with a count upon a judgment, which may account for the words of the section applying only to actions upon judgments *simpliciter*. In the present state of the law, which allows the joinder of several causes of action, it is rather for the advantage of a party against whom the same person has a judgment and another cause of action that the two should be joined.

But the ground of our decision is, that the words of sect. 4 of stat. 43 G. 3. c. 46. do not extend to an action where a count on a judgment is joined with a count on some other cause of action. I adhere to the plain words

1862.

JACKSON

v.

EVERETT.

of the section, and therefore think that the rule should be made absolute, but without costs.

BLACKBURN J. The whole question turns on sect. 4 of stat. 43 G. 3. c. 46. Before that statute a plaintiff would have had his costs if he had recovered, whether in an action on a judgment alone, or on a judgment and some other cause of action. By sect. 4 the legislature has altered that law to a certain extent. I can see many reasons for an enactment that, where an action is brought on a judgment joined with some other cause of action, the plaintiff should not recover any costs on that part which relates to the judgment. But, looking at the enactment, we do not find the words "in any action in which there is a count upon a judgment, the plaintiff shall not recover costs on that count," or any words to that effect. The words are "the plaintiff in such action on the judgment shall not recover or be entitled to any costs of suit;" and it would strain the words to construe them as meaning that the plaintiff should not recover the costs on the count on the judgment. I think there are no words in the section which justify me in saying that our decision should be in favour of the defendant.

Rule discharged, without costs.

1862.

The Vestry of St. LUKE's, Middlesex, appellants,
against LEWIS, respondent.

Saturday,
January 18th.

*Metropolis
Local Manage-
ment Act,
18 & 19 Vict.
c. 120. Con-
version of
privy into
watercloset.*

1. The Metropolis Local Management Act, 18 & 19 Vict. c. 120., empowers the vestry or district board of the parish or district, if necessary, to convert an insufficient privy into a watercloset.

2. In a parish included in Schedule A. to that Act, the vestry, in consequence of complaints of the condition of two privies to four houses in a court, served upon the owner a notice to do certain works, which he complied with so far as to fix pans to the closets, but not in providing water supply. The surveyor to the vestry, after due notice to the owner, entered upon and inspected the premises, and opened the drains passing under the footway pavement and connecting the privies with the sewer, which were found to be choked and blocked up. These drains he cleansed and put in order at the expence of the vestry, which then served notice on the owner, requiring him to find water supply to the closets; to which no attention having been paid, the vestry, after giving notice of their intention to do so, entered on the premises by their officers, and fixed a cistern upon the roof of the privies, removing the roof, and also three courses of brick work on the upper side or pitch thereof for the purpose of procuring a level base for the cistern; the roof was not replaced, but the lower part of the cistern formed a new roof. They also fitted the necessary plumber's work for connecting the cistern with the pipes of the water company, and also the pipes connecting the cistern with the pans of the closets, and they also fixed new seats in the privies. When the officers entered on the premises to do the above work, the pans of both the privies were filled and choked up with filth, and the seats and floor were covered with filth in consequence of the want of water supply. Held that, under the Act, the vestry were entitled to do what they had done, and to recover the expences from the owner of the houses.

THE following case was stated by a Metropolitan Police Magistrate for the opinion of the Court under stat. 20 & 21 Vict. c. 43.

This case is the result of a summons issued by the vestry of the parish of *Saint Luke, Middlesex* (which is a parish included in Schedule A, to the Metropolis Local Management Act), under the 226th section of the said Act, against Mr. *Thomas Lewis*, the respondent, as follows, viz.

"To Mr. *Thomas Lewis*, of No. 82, *Upper Street, Islington*, in the county of *Middlesex*, the owner of the premises situate at *John's Place, Great Arthur Street*, in

VOL. I.

3 M

B. & S.

1862.
Vestry of
ST. LUKE'S
v.
LEWIS.

the parish of *Saint Luke, Middlesex*, and within the Metropolitan Police District.

"You are required to appear before me, one of the Magistrates of the Police Courts of the Metropolis, sitting at the Police Court at *Clerkenwell*, within the Metropolitan Police District, on *Wednesday*, the 19th day of *December* instant, at the hour of twelve at noon, to shew cause why an order should not be made, under the provisions of The Metropolis Local Management Act, 1855, requiring you to pay to the vestry of the said parish of *Saint Luke, Middlesex*, the sum of 12l. 10s., being the expense of certain works executed by the said vestry upon the said premises *John's Place, Great Arthur Street*, within their district, under the said Metropolis Local Management Act.

"Given under my hand this 15th day of *December*, 1860.

(Signed) "J. H. Barker."

This summons was heard before me at the *Clerkenwell* Police Court, on *Wednesday*, the 19th *December*, 1860. The facts, as proved by the witnesses for the appellants (the respondent calling no evidence), were as follows:—

Mr *Thomas Lewis*, the respondent, is the owner of four houses in *John's Place, Great Arthur Street*, which is a Court in the parish of *Saint Luke*, and which houses were erected before the passing of The Metropolis Local Management Act. These houses have attached to them two privies. Early in the Spring of 1860, the vestry, in consequence of some complaints respecting the condition of these privies, served upon Mr. *Lewis* a notice to do certain works, which he complied with so far as to fix pans to the closets, but not in providing water supply. On the 14th day of *July*, 1860, a notice, of which the following is a copy, was served upon Mr. *Lewis*, viz.

"To Mr. *Thomas Lewis*, of No. 82, *Upper Street*,

Islington, owner of the premises called or known as *John's Place*, *Arthur Street* in the parish of *Saint Luke*, *Middlesex*.

1862.

Vestry of
ST. LUKE'S
V.
LEWIS.

"I, *William Christie*, Surveyor to the vestry of the said parish of *Saint Luke*, do hereby give you notice, in pursuance of the provisions of the Act 18 & 19 *Vict. c. 120.*, that it is my purpose and intention, after the expiration of twenty-four hours from the service of this notice, to enter into and upon the said premises *John's Place*, *Arthur Street*, aforesaid, to inspect the drains, waterclosets, privies, cesspools and water supply apparatus, and to cause the ground to be opened in such place or manner as may be necessary, and to execute such other works as to me may seem expedient.

(Signed) " *William Christie.*"

"Dated this 14th day of *July*, 1860. "245, *City Road.*"

In pursuance of this notice the surveyor to the vestry entered upon and inspected the said premises, and opened the drains passing under the footway pavement, and connecting the privies with the sewer, which were found to be choked and blocked up. These drains he cleansed and put in order at the expense of the vestry. The vestry then served a further notice as follows, viz.

"Parish of *Saint Luke*, *Middlesex*.

"Metropolis Local Management Act.

"Vestry Clerk's Office, Workhouse, *City Road*.

"No. 375, Immediate.

"21st *August*, 1860.

"To Mr. *Thomas Lewis*, of No, 82, *Upper Street*, *Islington*.

"Take notice that you are hereby required to find water supply to the two closets in *John's Place*, *Arthur Street*, in the said parish of *Saint Luke*, *Middlesex*, within twenty-eight days from the date hereof, to the satis-

1862.

Vestry of
ST. LUKE'S
v.
LEWIS.

faction of the vestry, and further take notice that, if you refuse or neglect to construct the works aforesaid, the vestry will, at the expiration of the said period of twenty-eight days, cause the same to be constructed, and will proceed to recover the expenses from you in the manner in the said Act provided."

(Signed) "John Parson,
"Vestry Clerk."

No attention having been paid by Mr. *Lewis*, to this notice, a further notice was served upon him on the 26th November, 1860, as follows, viz.

"To Mr *Thomas Lewis*, of No. 82, *Upper Street, Islington*, in the county of *Middlesex*, owner of the premises known as *John's Place, Arthur Street*, in the parish of *Saint Luke*, in the said county, and within the Metropolitan Police District.

"Take notice that, at the expiration of twenty-four hours from the service hereof the vestry of the said parish of *Saint Luke* will, in pursuance of the provisions of the Metropolis Local Management Act, and of the notice in that behalf served upon you on the 21st day of *August* last, by their surveyor, agents and workmen, enter into and upon the said premises, *John's Place, Arthur Street*, aforesaid, and proceed to amend and reinstate the drainage of the privies there, to cleanse, empty and destroy the cesspools, and provide all such pans and traps, water supply and water supply apparatus, pipes and cisterns, as to the said vestry or their surveyor may appear proper and requisite; and do further give you notice and require you to observe that, in case you should obstruct, hinder or molest the said surveyor to the said vestry, his agents or workmen, you will, under the provisions of the said Act, be liable to a penalty of 5*l*.

"Dated the 26th day of *November*, 1860, at the Board Room, *Saint Luke's Workhouse, City Road.*

(Signed) "*John Parsons,*

"Clerk to the Vestry of *Saint Luke's.*"

1862.

Vestry of
ST. LUKE'S
V.
LEWIS.

In pursuance of this notice the vestry, on the 1st *December*, 1860, entered upon the premises and fixed a cistern upon the roof of the privies, removing the roof and also three courses of brick work on the upper side or pitch thereof for the purpose of procuring a level base for the cistern; the roof was not replaced, but the lower part of the cistern formed a new roof. They also fitted the necessary plumber's work for connecting the cistern with the pipes of the water company, and also the pipes connecting the cistern with the pans of the closets, and they also fixed new seats in the privies, at an expense to the vestry of 12*l.* 10*s.*

The surveyor to the vestry and the sewers contractor likewise proved that, at the time of their entering upon the premises to do the works, the pans of both the privies were filled and choked up with filth, and that the seats and floor were covered with filth in consequence of the want of water supply.

The works having been completed, the vestry forthwith took out the summons hereinbefore set forth. After hearing the case I delivered judgment in favour of Mr. *Lewis*, the respondent, having referred to the notices which the vestry had given and which are set forth in this case: holding that The Metropolis Local Management Act, and especially the 81st, 82d and 85th sections thereof, under which the vestry had acted in carrying out the works done, contains no power to convert a privy into a watercloset, by providing water supply thereto, as had been done in this instance; but that, if the privy already established was not sufficient, the ves-

1862.

Vestry of
ST. LUKE'S
v.
LEWIS.

try should have required the respondent to have made it so, and on his default the vestry were empowered to make it sufficient, under the authority of the 81st section, by doing such works as the case required, and then to have recovered from the respondent the expenses incurred by them in so doing; and I felt myself supported in that construction of the statute by the authority of the case of *Tinkler v. The Board of Works for the Wandsworth District*, 27 *Law Journal Chancery Reports*, p. 342 (a).

The vestry of the parish of *Saint Luke* made application to me in pursuance of the powers of the 20 & 21 *Vict. c. 43.*, within the period of three days, stating that they were dissatisfied with my decision as erroneous in point of law, and desiring me to state and sign a case setting forth the facts and grounds of my determination for the opinion thereon of the Honorable Court of Queen's Bench, and I have stated this case accordingly.

The opinion of the Honorable Court of Queen's Bench is therefore asked, whether, under the circumstances herein detailed, I ought to have made an order upon the respondent for payment of the said sum of 12l. 10s.

(Signed) "J. H. Barker.

"5th March, 1861."

Bovill, for the appellants.—This case depends on the construction of certain sections of the "Act for the better Local Management of the Metropolis," 18 & 19 *Vict. c. 120.* The first of these is sect. 81. "After the commencement of this Act, it shall not be lawful newly to erect any house, or to rebuild any house pulled down to the extent aforesaid, within any parish mentioned in Schedule A. to this Act, or any district mentioned in Schedule B. to this Act, without a suffi-

(a) Also reported, 2 *De Gaz & Jones*, 261.

cient watercloset or privy and ashpit furnished with proper doors and coverings, and also furnished as regards the watercloset with suitable water supply and water supply apparatus, and with suitable trapped soil pan and other suitable works and arrangements, so far as may be necessary to ensure the efficient operation thereof; and whosoever shall offend against this enactment shall be liable to a penalty not exceeding twenty pounds; and if at any time it appear to the vestry or district board of such parish or district that any house in any such parish or district, whether built before or after the commencement of this Act, is without a sufficient watercloset or privy and ashpit furnished with proper doors and coverings, and with other apparatus and works as aforesaid, the vestry or district board shall, in case the same can be provided without disturbing any building, give notice in writing to the owner or occupier of such house, requiring him forthwith, or within such reasonable time as shall be specified in such notice, to provide a sufficient watercloset or privy and ashpit so furnished as aforesaid, or either of them, as the case may require; and if such notice be not complied with, it shall be lawful for the vestry or district board to cause to be constructed a sufficient watercloset or privy and ashpit, or either of them, or do such other works as the case may require, and to recover the expenses incurred by them in so doing from the owner of such house in manner hereinafter provided: Provided always, that where a watercloset or privy has been and is used in common by the inmates of two or more houses, or if in the opinion of the vestry or district board a watercloset or privy may be so used, they need not require the same to be provided for each house."

1862.

Vestry of
St. Luke's
v.
Lewis.

1862.

Vestry of
St. Luke's
v.
LEWIS.

Sect. 82 gives power of inspection.

Sect. 83 provides for the case of persons improperly making or altering drains.

Sect. 85. "If upon such inspection as aforesaid, any drain, watercloset, privy, or cesspool appear to be in bad order and condition, or to require cleansing, alteration, or amendment, or to be filled up, the vestry or board shall cause notice in writing to be given to the owner or occupier of the premises upon or in respect of which the inspection was made, requiring him forthwith, or within such reasonable time as shall be specified in such notice, to do the necessary works; and if such notice be not complied with by the person to whom it is given, the vestry or board may, if they think fit, execute such works, and the expences incurred by them in so doing shall be paid to them by the owner or occupier of the premises."

Sect. 126. "Any occupier of any house or land or other person who refuses or does not permit any soil, dirt, ashes, or filth to be taken away by the scavengers appointed by, or contracting with any vestry or board as aforesaid, or who obstructs the said scavengers in the performance of their duty, shall for every such offence forfeit and pay a sum not exceeding five pounds."

The authority given by this statute to the vestry or district board of the parish or district is "to cause to be constructed a *sufficient* watercloset or privy and ash-pit, or either of them &c." when required, and there can be no difference for this purpose between a house having no watercloset and a house having an insufficient watercloset. Moreover, in this case, not one of these four houses had either a watercloset or a privy to itself. The magistrate founded his decision in favour of the respon-

dent on *Tinkler v. The Wandsworth District Board of Works* (a), which is, however, very distinguishable. There the Board of Works for the *Wandsworth* District stated that it was their intention to do away with all privies within the district, and insisted on their being converted into waterclosets; and it was held that in this they exceeded their powers. In many cases, as for instance that of a single house in an open district, with an old woman the only inhabitant of the house, it would be absurd to contend that the construction of a watercloset was necessary. But it is otherwise in a crowded court with one privy for every two houses. (He was then stopped.)

1862.

Vestry of
St. LUKE'S
v.
LEWIS.

Beasley, contra. The words of the 85th section, "if any drain, watercloset, privy, or cesspool appear to be in bad order and condition, or to require cleansing, alteration, or amendment, or to be filled up &c.," must be construed "*reddendo singula singulis*." The alternative given to the vestry or district board is to construct a watercloset or a privy according to the class of house—they have no power to compel the owner of a small house to incur the expence of a watercloset, unless a privy would be insufficient, and that fact is not found here. The imposing such an expence on the owner of a small house would, in many cases, render it valueless; for the trifling rent that could be obtained for it would cease to be any compensation to the landlord. *Tinkler v. The Wandsworth District Board of Works* (a) is expressly in point. [*Wightman* J. In that case there was a general order to abolish all privies within the district; and Lord Justice *Turner*, p. 349, expressly alludes to that circumstance.] He declines to decide

(a) 27 *L. J. Chan.* 342. Also reported, 2 *De Gex & Jones*, 261.

1862.

Vestry of
St. Luke's
v.
LEWIS.

the present question ; but Lord Justice *Knight Bruce* puts the case on the broader ground. At p. 346 he says, "Remarkable as some of the provisions of that statute (18 & 19 *Vict. c. 120.*) seem to be, I am of opinion that they do not deal with the rights of property in such a way as the defendants contend that they do ; nor can I find in the two statutes (i. e. 19 & 20 *Vict. cc. 120, 121*) any warrant &c. for what the defendants have been attempting and now insist upon. The question is, not whether they have power to cause or order privies within their district to be put in a proper and decent state, if not in that state ; but it is, whether they have the right or power to force on the plaintiff the mechanical contrivance of waterclosets, with their requisite apparatus, for which he is to find water supply as best he may, instead of the privies (sufficient as privies if kept in a condition proper for such conveniences are,) which are upon his land for the purposes of his cottages there. The claim of the defendants in that respect appears to me manifestly groundless." That judgment also seems to shew that the vestry here have attempted, under colour of this statute, to do what could only be done by justices of the peace under the "Nuisances Removal Act," 19 & 20 *Vict. c. 121.*

Bovill was not called on to reply.

COCKBURN C. J. I am of opinion that the decision of the magistrate in this case was erroneous. The question submitted to us is, if sect. 81 of this Act authorizes the vestry or district board, where a house has an insufficient privy, to direct that a watercloset shall be constructed in its stead. The whole question turns

on these words in that section: "If at any time it appear to the vestry or district board &c. that any house &c. is without a sufficient watercloset or privy and ashpit furnished with proper doors and coverings, and with other apparatus and works as aforesaid, the vestry or district board shall, in case the same can be provided without disturbing any building, give notice in writing to the owner or occupier of such house, requiring him forthwith, or within such reasonable time as shall be specified in such notice, to provide a sufficient water-closet or privy and ashpit so furnished as aforesaid, or either of them, as the case may require; and if such notice be not complied with, it shall be lawful for the vestry or district board to cause to be constructed a sufficient watercloset or privy and ashpit, or either of them, or do such other works as the case may require, and to recover the expences incurred by them in so doing from the owner of such house in manner herein-after provided."

On the part of the vestry it is urged that they were right in holding that the privies attached to these houses were insufficient: while the contention of the respondent is, that although the vestry might have directed him to alter those privies so as to make them sufficient, they could not order waterclosets to be put up in place of them. I do not see that such is the necessary effect of the language of the Act: quite the contrary. Power is given to the vestry &c. to cause to be constructed a sufficient watercloset or privy, "or either of them;" which last words seem very strong to shew that if the fact is once established that there is an insufficient privy, they are to have authority to order a watercloset or privy in the alternative. Under particular circumstances, neither

1862.

Vestry of
St. Luke's
v.
LEWIS.

1862.

Vestry of
St. Luke's
v.
Lewis.

a new privy could be constructed nor an old one altered so as to meet the necessity of the case. An existing privy might be so crowded that it would be impossible to keep it clear of an accumulation of filth, which might cause disease; so that the only remedy would be by introducing water to carry the filth into the sewers, and so get rid of it. It is right that the authorities appointed by the legislature to attend to the sanitary condition of the parish or district should have the power to do this, and I think the Act has given it to them. In *Tinkler v. The Wandsworth District Board of Works* (a), the board came to the determination that all privies in the district should be converted into water-closets.

WIGHTMAN J. I am of the same opinion. If the authorities of this parish have power to order the conversion of a privy into a watercloset, the circumstances stated in the case relative to the condition of these privies fully justify their doing so in the present instance. The words of the Act appear completely to warrant them in what they have done, for it says they may act "as the case may require;" they may "cause to be constructed a sufficient watercloset or privy, or either of them."

As to *Tinkler v. The Wandsworth District Board of Works* (a), on which reliance has been placed by the respondent, there is an obvious distinction between it and the present case: for there the defendants had declared their intention to do away with all privies within the district, whether sufficient or not.

(a) 27 L. J. Chan. 342. Also reported, 2 De Gex & Jones, 261.

CROMPTON J. I am of the same opinion. Those last words "or either of them" appear to me quite clear, and to remove all doubt. It is no answer for the respondent to say that there is another remedy in certain cases where a watercloset or privy becomes a nuisance to the neighbourhood.

Judgment for the appellants.

1862.

Vestry of
ST. LUKE'S
v.
LEWIS.

BEHN *against* BURNES.

Tuesday,
January 21st.

By memorandum of charter-party, dated *London*, it was agreed between *A. B.*, therein described as "owner of the good ship or vessel called the *M.*, of 420 tons or thereabouts, *now in the port of Amsterdam*," and *C. D.*, that the said ship, being tight, staunch, strong, and every way fitted and ready for the voyage, should "with all possible despatch proceed direct to *N. &c.*" In an action by the shipowner against the charterer for not loading the agreed cargo: Held; per *Cockburn C. J.*, *Crompton* and *Mellor J.J.*, dissentiente *Wightman J.*; that the words "*now in the port of Amsterdam*," did not amount to a warranty, or constitute a condition precedent to the contract, that the ship was there at the time of making the memorandum of charter-party.

Charter-party.
Warranty.
Position of
ship.

THE declaration alleged that the plaintiff and the defendant agreed by charter-party that the plaintiff's ship called *The Martaban*, then in the port of *Amsterdam*, and being tight, staunch, strong and every way fitted and ready for the voyage, should, with all possible despatch, proceed direct to *Newport, Monmouthshire*, and that the defendant should there load her with a full cargo of coals, which she should carry to *Hong Kong*, and there deliver in consideration of freight, to be paid after the rate of sixty shillings sterling for every ton of twenty hundred weight of coals so delivered, and at the times and in the manner following: that is to say, one third by charterer's acceptance at three months date from the final sailing of the vessel, or at the owner's

1862.

BEHN

v.
BURNES.

option in cash, under discount at two and half per cent. ; one third by charterer's acceptance at six months date, the charterer to insure the amount and deduct the cost of insurance ; and the remaining one third of the freight by the charterer's acceptance at three months date from the delivery to the charterer, in *London*, of a certificate in writing, signed by the consignee, of the right and true delivery of the cargo agreeably to bills of lading, or in cash under discount at five pounds per cent. per annum, at charterer's option : and that the defendant should be allowed ten days for loading, and should receive the said cargo as delivered from on board at the rate of not less than thirty-five tons a working day, weather permitting, or in default should pay demurrage at the rate of four pence per ton register per like day. Averment of performance by the plaintiff, and default by the defendant.

Plea. That at the time of making the charter-party, time was an essential and material part of the contract, and the then situation of the ship was a material and essential part of the contract, as the plaintiff and defendant respectively then well knew, and that the said ship was not, at the time of making the said charter-party, in the port of *Amsterdam*, of which the defendant then had no knowledge or notice.

Issue.

The following special case, of which the pleadings were to be deemed part, was stated by consent of the parties under the order of a Judge.

By memorandum of charter-party, dated *London*, the 19th *October*, 1860, the plaintiff's ship "*Martaban*" was chartered to the defendant in the words and figures following, viz. : "It is this day mutually agreed between *A. Behn*, Esq., owner of the good ship or vessel called *The Martaban*, of 420 tons or thereabouts,

now in the port of *Amsterdam*, and *James Burness*, Esq., of *London*, merchant, that the said ship being tight, staunch, strong, and every way fitted and ready for the voyage, shall, with all possible dispatch, proceed direct to *Newport, Monmouthshire*, addressing to Messrs. *G. W. Jones & Co.* for entering and clearing, and there load in the usual and customary manner in ten days, at any one of the usual loading places. Freighter may name a full and complete cargo of coals, which said freighter binds himself to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions and furniture, (the captain to have a sufficient quantity of coal on board at port of loading for ship's use for the voyage, and have the same endorsed on bills of loading, independently of the cargo): and being so loaded, shall therewith proceed to *Hong Kong*, or so near thereunto as she may safely get, and deliver the same alongside any craft, steamer, floating depôt or pier named by the consignee, notice to be given to the agent or consignee of the vessel being ready to discharge, (the act of God, the Queen's enemies, riots and strikes of pitmen, fire, and all and every other dangers and accidents of the seas, rivers and navigation always mutually excepted): the freight to be paid on the quantity delivered in accordance with this charter, at and after the rate of sixty shillings sterling per ton of twenty hundred weight in full of all port charges, wharfage, consulage, pilotage, *Ramsgate* and *Dover* dues, and to become due, say $\frac{1}{3}$ rd by charterer's acceptance at 3 months date from the final sailing of the vessel, or at owner's option in cash, under discount at $2\frac{1}{4}$ per cent.; $\frac{1}{3}$ rd by charterer's acceptance at 6 months, the charterer to insure the amount and deduct the costs of insurance; the remaining $\frac{1}{3}$ rd of the freight, less the

1862.

 BEHN
v.
BURNES.

1862.

 BEHN
 v.
 BURNES.

cost of any coals short delivered at the port of final discharge, and after deducting such cash as may be advanced by the agent of the charterer's for ship's use, which the captain is at liberty to draw to extent of 200*l.* on usual terms against captain's draft on charterer at 90 days sight, to be paid by the charterers at 3 months date from the delivery to the charterer in *London*, of a certificate in writing signed by the consignee, of the right and true delivery of the cargo, agreeably to bills of lading, or in cash under discount at 5 per cent. per annum, at freighter's option. The vessel to deliver as customary, and the cargo to be delivered by the captain and received by the consignee at the rate of not less than 35 tons a working day, weather permitting, or to pay a demurrage at the rate of four pence per ton register per like day. The vessel to be addressed to freighter's agents inwards only, at the port of discharge, free of commission, but paying 2 per cent. to charterer in *London*, same to be deducted from 1st payment of freight: any claim of average to be settled according to the custom at *Lloyd's*: a commission of 5 per cent. on amount of freight is due by the owner on signing this charter-party to *David Brown*, ship broker, *London*, and to whom the ship is to be addressed on her return to *London*: penalty for non-performance of this agreement, estimated amount of freight."

The ship *Martaban* arrived on the previous 15th *October*, 1860, at *Nieuwediep*, at the entrance to the *Great Noord Hollandische Canal*, on her way with a cargo from *Sourabaya* to the docks at *Amsterdam*, which, under favourable circumstances, she could have reached in twelve hours more; but, in consequence of strong gales from the opposite quarter, and the absence of steam tug power, she was unavoidably prevented from

reaching the place of discharge in the *Amsterdam Docks* before day break on the 23d day of the same month of *October*. *Nieuwdiep*, the place where the vessel was unavoidably detained by the circumstances aforesaid on the said 19th day of *October*, the date of the above recited memorandum of charter-party, is a place in the direct course of the said vessel to *Amsterdam*, and is sixty-two *English* miles from that place, but is not within the port of *Amsterdam*.

1862.

BEHN
v.
BURNES.

The ship *Martaban*, having discharged her cargo with all possible despatch, was immediately made ready for sea, and without any delay sailed on the 16th day of *November*, and proceeded direct for *Newport*, pursuant to the charter-party, and arrived there on the 1st *December* following. Notice was given to the defendant's agent at *Newport* on the 5th day of the same *December* that the ship was ready to receive cargo, and on the 16th *December* the stipulated lay days expired. The defendant continually, up to the expiration of the said lay days and afterwards, refused to load the ship. The plaintiff as soon as possible thereafter, namely on the 20th *December*, rechartered the vessel for *Hong Kong* from *Newport*, with a cargo of coals, at a smaller rate of freight than the defendant had agreed to pay, being at the time the highest that could be obtained; and thereupon the vessel, having loaded with all possible dispatch, sailed without delay for *Hong Kong*.

The following statement is added at the request of the defendant's counsel, and under protest by the plaintiff's counsel.

Before the charter was made, the defendant told the plaintiff's broker that he, the defendant, had a contract

1862.
BEHN
v.
BURNESB.

with the *English* government to supply coals at *Hong Kong* in *China*, and that he was taking up the ship for the purpose of fulfilling that contract. The defendant did not state that there was any limit of time for the performance of the contract with the government, but he said that there had been so much delay in the sailing of the ships previously taken up, he would not take up any which he was not certified was ready, or as near as possible ready.

The question for the opinion of the Court is, Whether the words *now in the port of Amsterdam* in the said charter-party amount to a warranty, and, if so, whether the position of the ship *Martaban* on the 19th day of *October* amounted, under the circumstances, to a breach of that warranty.

If the Court shall be of opinion that the plaintiff is entitled to recover, the question of damages is to be referred to the Master, and judgment to be entered for the plaintiff for such damages and costs of suit.

If the Court shall be of opinion that the plaintiff is not entitled to recover, then judgment of *nolle prosequi*, with costs of defence, shall be entered up for the defendant.

Manisty (*Maclachlan* with him), for the plaintiff.—The words in this charter-party, “now in the port of *Amsterdam*,” do not constitute a warranty or condition precedent to the contract that the ship was there at the time of the execution of the instrument, and, if they did, here was no breach of it. The rule in construing contracts of this nature is to look to the intention of the parties as collected from the instrument. Here the intention was that the statement of the position of

1862.

 BEHN
 v.
 BURNES.

the ship should be mere matter of description, and if any damage resulted to the charterer from his object being frustrated in consequence of her not being in that position at the time, his remedy should be by a cross action for damages: and this construction is in accordance with that put on instruments of this nature in *Ritchie v. Atkinson* (a), *Freeman v. Taylor* (b), *Clipsham v. Vertue* (c) and *Barker v. Windle* (d). *Dimech v. Corlett* (e), where the previous cases are reviewed, is an express authority on the point. [*Crompton J. Ollive v. Booker* (f), decided eleven years before, seems the other way. His Lordship also mentioned *Boone v. Eyre* (g). *Wightman J.* referred to *Kenyon v. Berthon* (h) and *Colby v. Hunter* (i).] Those two cases were on policies of insurance, which are a very different thing, for there the whole risk and premium depends on the representation. Great inconvenience would result from holding such matters as these conditions precedent; for if the statement as to the exact position of the ship or the time of her sailing is to be deemed part of the essence of the contract, the variance of a few yards or minutes would vitiate the whole. Moreover if the words, "now in the port of *Amsterdam*," are to be construed as amounting to a condition precedent, a similar construction ought to be put on the other words in the same sentence, being, "tight, staunch, strong, and in every way fitted and ready for the voyage;" which is contrary to *Tarrabochia v. Hickie* (k).

The verbal statement introduced into this case under

(a) 10 *East*, 295.

(c) 5 *Q. B.* 625.

(e) 12 *Moo. P. C. C.* 199.

(g) 1 *H. Bl.* 273 (note).

(i) 1 *Mood. & M.* 81.

(b) 8 *Bing.* 124.

(d) 6 *E. & B.* 675

(f) 1 *Exch.* 416.

(h) 1 *Dougl.* 12. n. (4)

(k) 1 *H. & N.* 183.

1862.
 BEHN
 v.
 BURNES.

protest ought not to be attended to—the doing so would have the effect of importing a verbal statement into a charter-party: *Hurst v. Usborne* (a). [*Wightman* J. The new matter introduced makes no difference, because it says the ship must be “ready or as near as possible ready.”]

F. M. White (*Honyman* with him), contra.—The statement of the position of the ship in this charter-party is a warranty that she was at that place at the time; and the facts shew a breach of it. The rule has been correctly stated by the other side, that the thing to be looked to is the intention of the parties as collected from the instrument. It is to be observed that the words here are not the usual ones, that the ship shall proceed on her voyage “with all convenient speed,” but “with all possible despatch.” *Ollive v. Booker* (b) is an authority in point for the defendant; and there are several other instances where statements of this nature have been held to amount to conditions precedent: e. g. that a ship shall answer a particular description, *Hurst v. Usborne* (a); that she shall be seaworthy when about to sail, *Thompson v. Gillespy* (c); that she shall sail on a particular day, *Cranston v. Marshall* (d), *Croockewit v. Fletcher* (e); that she shall be ready to receive cargo at a certain time, *Oliver v. Fielden* (f); and that goods are on passage at the time of sale, *Gorrissen v. Perrin* (g).

As to the authorities which have been cited by the

(a) 18 C. B. 144.

(c) 5 E. & B. 209.

(e) 1 H. & N. 893; 26 L. J. Exch. 153.

(f) 4 Exch. 135.

(b) 1 Exch. 416.

(d) 5 Exch. 395.

(g) 2 C. B. N. S. 681.

other side, *Dimech v. Corlett* (a) was decided on its peculiar circumstances; *Ritchie v. Atkinson* (b) was an action for freight, and there had been a part performance, and it is distinguished on that ground in *Glaholm v. Hays* (c). *Barker v. Windle*, in the Exchequer Chamber (d), is more fully reported, 25 *L. J. Q. B.* 349, nom. *Windle v. Barker*, from whence, and especially from the judgment of *Martin B.*, it appears that the question there was one of fact rather than of law: besides, the ship was only described as being of the specified size, or "thereabouts," so that there could be no pretence for suggesting a warranty as to size.

1862.

 BEHN
v.
BURNES.

Manisty, in reply.—It is doubtful whether *Cranston v. Marshall* (e) and *Croockewit v. Fletcher* (f) will stand, if brought before a higher tribunal. If they do, it will be on the ground taken in *Tarrabochia v. Hickie* (g) and *Seeger v. Duthie* (h), that a contract that a ship shall sail on a given day is a warranty, although a contract that she is to sail "within a reasonable time," or "with all possible despatch," is not. If the words here amount to a warranty, no qualification can be grafted on it, for a warranty must be taken in omnibus.

COCKBURN C. J. Our judgment should be for the plaintiff. I feel considerably embarrassed by the conflict of authority which we find in the cases that have

(a) 12 *Moo. P. C. C.* 199.(b) 10 *East*, 295.(c) 2 *Man. & Gr.* 257.(d) 6 *E. & B.* 675.(e) 5 *Exch.* 395.(f) 1 *H. & N.* 893; 26 *L. J. Exch.* 153.(g) 1 *H. & N.* 183.(h) 8 *C. B. N. S.* 45; 29 *L. J. C. P.* 253.

1862.

 BEHN
 v.
 BURNESB.

been brought under our attention in the course of the learned arguments on both sides.

Ollive v. Booker (a) appears to me directly in point. The statement in the charter-party there was that the ship, relating to which the question arose, was then "at sea, having sailed three weeks ago;" and the Court of Exchequer held that that fact was a condition precedent to the enforcing of the contract by the shipowner against the charterer. On the other hand, *Dimech v. Corlett* (b) appears also in point to this case, and is in conflict with the preceding one of *Ollive v. Booker* (a). In *Dimech v. Corlett* (b) the representation was that the vessel, the subject of the charter-party, was then at anchor at a given place, and it appeared that, so far was that from being the fact, she was in dry dock and undergoing the process of being sheathed in copper; and the contract was that she, being in the position described, should sail "with all convenient speed." The Privy Council held that her being in that position was not a condition precedent—that, if she was not there, it was merely matter of cross action for damages; or that, if the object of the voyage was frustrated, it might be a good answer to an attempt of the shipowner to enforce the contract against the charterer.

In this conflict of the decisions the right course for this Court is to abide by the later decision, which is also that of a Court of very high authority, and one or more of the members of which were particularly conversant with shipping law.

I own if this question were *res integra* I should be much disposed to think that the best mode of construing

(a) 1 *Exch.* 416.

(b) 12 *Moo. P. C. C.* 199.

1862.

 BEHN
v.
BURNES.

these charters, where there is a representation as to the place of a ship, or as to the time of sailing, or analogous matter, would be to hold that, if the fact represented turns out not to be correctly stated, and in consequence of it the charterer finds himself in a position where his speculation and enterprise may be frustrated, and the contemplated advantages of them converted into disaster and loss, that should justify him in repudiating the contract. But, on the other hand, where the representation is that the ship is at a given place, or is to sail on a given day, &c., and it turns out that she was not there, or could not sail for some short time after that specified, &c., and there is no real frustration of the objects of the charterer, and little or no damage has been done to him, he should be left to his action. I throw this out with a view to legislation rather than to interpretation of the law, supposing no authority on the subject. I do not feel it at all necessary to express judicially any opinion upon it; I only say that here is a conflict of authority, and I will abide by the latest decision. I sincerely hope that the parties will go to a Court of error where the law may be satisfactorily settled.

I have to say, on the part of my brother *Wightman* (a), that he thinks we ought to abide by the cases referred to by Mr. *White*, and ought not to overrule them on the opinion of the Privy Council.

CROMPTON J. The difficulty here is that there are so many of these decisions, and it is not easy to reconcile them. I join in the opinion of my Lord Chief Justice that this case should go to a Court of error, which will be less hampered by contradictory decisions, and able to

(a) *Wightman* J. had left the Court before the judgment.

1862.
 BEHN
 v.
 BURNES.

lay down the law more authoritatively than we can, who are only a Court of co-ordinate jurisdiction. Many of the cases justify my brother *Wightman* in his doubts, but I agree with the view of my Lord Chief Justice. I think it lies on the party setting up this kind of statement as a condition precedent to shew that it is one, i. e. that the parties intended that there was to be no contract unless the stipulation was performed to the letter. Now, looking at the earlier authorities, I cannot help thinking that the law on this subject is a branch of the general law as laid down in *Boone v. Eyre* (a). Lord *Manfield* there says: "The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent." Here a very minute matter, such as a discrepancy of a day or an hour, would be a breach if the statement is to be taken as a condition precedent; which is the proper expression, as stated by my brother *Williams* in *Barker v. Windle* (b) in the Exchequer Chamber, who points out that "warranty" is not the correct one, for if there is a warranty the party must sue on it.

The early cases bear very much the aspect that things of this kind are to be looked on as matter of stipulation merely, unless you can see very clearly from the terms of the instrument that it was the intention of the parties not to be bound unless they were performed to a hair's breadth. The words in the present charter-party, that the ship was to sail "with all possible despatch," created

(a) 1 H. Bl. 273, note.

(b) 6 E. & B. 675. 679.

my chief doubt; but it is too slight to act on. Now *Ollive v. Booker* (a), which was decided about eleven years ago, and some other cases, varied the old notion about independent stipulations. I was never quite satisfied with them, but should feel bound by them. *Ollive v. Booker* (a) is very near the present case, but *Dimech v. Corlett* (b) is still nearer, for it is almost word for word. I should not like to found my judgment on any minute or fine-spun difference between those two cases, yet, when we look at the decisions which have taken place within the last two or three years, we must consider *Ollive v. Booker* as in some degree shaken, and that they are I think nearer to what the law ought to be. At all events, we must go by the latest authority, and leave the question to the Exchequer Chamber.

1862.

BEHN
v.
BURNES.

MELLOR J. With very considerable hesitation I have arrived at the same conclusion with my Lord Chief Justice and my brother *Crompton*. I cannot distinguish this case from *Ollive v. Booker*. That case has, however, been broken in on by the subsequent decision in *Dimech v. Corlett*, and I shall therefore abide by that decision. I should have been glad if *Ollive v. Booker* had been alluded to in the judgment there, and the distinction between the cases pointed out. I consider that the onus of proving this statement to be a condition precedent lies on the person who asserts it to be such. Looking at the charter-party, I do not think this is a condition precedent, and rather think it is not.

Judgment for the plaintiff.

(a) 1 Exch. 416.

(b) 12 Moo. P. C. C. 199.

1862.

Wednesday,
January 22d.

Pauper
lunatic.
Part of mother's family.
Emancipation.
16 & 17 Vict.
c. 97. s. 102.
Removability.
9 & 10 Vict.
c. 66. and 11
& 12 Vict.
c. 111.

The QUEEN *against* The Churchwardens and
Overseers of the Parish of ST. MARY ARCHES,
EXETER.

1. A pauper lunatic had resided for more than five years in the respondent parish with her father and mother, when he died, and she continued to reside with her mother in that parish till *October* 1858, when she was sent to the workhouse, where she remained till the *24th January*, 1860. In *December*, 1859, her mother went to reside in another parish, but did not acquire any settlement in her own right. On the *24th January*, 1860, the pauper lunatic was sent from the workhouse to the county lunatic asylum and was confined there until the *25th April* following, when she was discharged and went to reside with her mother. Upon an appeal, against an order of adjudication and maintenance, under stat. 16 & 17 Vict. c. 97., upon the parish in which her father was settled: held that, the pauper lunatic being unemancipated, continued part of her mother's family, and therefore, her mother having ceased to be irremovable, she also ceased to be irremovable, and the order was rightly made.

2. *Quere*, whether an unemancipated child can acquire a status of irremovability in its own right?

UPON appeal against an order of two justices for the county of *Lancaster*, adjudging that the place of the last legal settlement of *Ann Cambridge*, a pauper lunatic, confined in the county lunatic asylum, situate at *Prestwich*, in the said county, was in the parish, township or place of *St. Mary Arches*, in the city and county of the city of *Exeter*, and ordering the guardians of the poor of that parish to pay to the guardians of the poor of the township of *Manchester*, in the county of *Lancaster*, certain sums of money in respect of the examination and maintenance of the pauper lunatic, the sessions confirmed the order, subject to the opinion of this Court on the following case.

The place of settlement of *David Cambridge*, the father of the pauper lunatic *Ann Cambridge*, was in the appellant parish. On the *3d October*, 1827, *David Cambridge* was married to *Elizabeth Trapnell*.

THE PAUPER LUNATIC.

The pauper lunatic is the legitimate unmarried daughter of *David Cambridge* and his said wife, and was born on the 16th *August*, 1829. She has never been emancipated, not having been able at any time, owing to ill health, to provide for or take care of herself. For twenty-four years, namely, from the month of *July*, 1832, up to the 23d *July*, 1856, the pauper lunatic and her parents resided together continuously in the respondent township. Upon the 23d *July*, 1856, *David Cambridge* died. After his death the pauper lunatic and her mother continued to reside together in the respondent township until the month of *October*, 1858, when the pauper lunatic was sent from her said place of abode in the township of *Manchester*, by the guardians of the poor of that township, into the *Cheetham Hill Workhouse*, the said workhouse being a workhouse of and for, and situate within, the township of *Manchester*. The pauper lunatic remained in the *Cheetham Hill Workhouse* until the 24th *January*, 1860. In the month of *December*, 1859, and whilst the pauper lunatic was in the *Cheetham Hill Workhouse*, her mother (who continued to be the widow of *David Cambridge*) removed from the township of *Manchester* to, and went to reside in, the township of *Chorlton-upon-Medlock*, in the said county, in which latter township she has ever since continued to reside. She has not, during her widowhood, acquired any settlement in her own right. Upon the 24th of *January*, 1860, *Ann Cambridge* was a pauper lunatic, and was, pursuant to the authority of the statutes in that behalf, sent from the *Cheetham Hill Workhouse*, where she was then residing, to the county lunatic asylum, situate at *Prestwich*, in the said county, and being a lunatic asylum for the said county; and *Ann Cambridge* was then received into the said asylum, and was confined therein until the 25th *April*, 1860, when she was discharged, and went to reside

1862.

The QUEEN
v.
Overseers of
St. Mary
ARCHES,
EXETER.

1862.
 The QUEEN
 v.
 Overseers of
 St. MARY
 ARCHES,
 EXETER.

with her mother in the township of *Chorlton-upon-Medlock*.

It was contended, on the part of the appellants, that, under the circumstances herein stated, the order ought not to have been made, inasmuch as the pauper lunatic was, at the time of her being conveyed to the county lunatic asylum at *Prestwich*, exempt from removal to the parish of her settlement by reason of some provision in the Act 9 & 10 *Vict. c. 66.*, and in the Act 11 & 12 *Vict. c. 111*.

It was contended, on the part of the respondents, that the order was rightly made, inasmuch as the pauper lunatic, when conveyed to the county asylum, was not exempt from removal to the parish of her settlement, under the said Act taken in connection with the Act 11 & 12 *Vict. c. 111*.

The question for the opinion of the Court is, whether the pauper lunatic was or was not, at the time of her being conveyed to the said county asylum, exempt from removal to the parish of her settlement. If this question be answered in the affirmative, the order is to be quashed. If in the negative, the order is to be confirmed.

The argument, which began on *January* 18th, was continued and judgment given on *January* 22d.

Wheeler Serjt. and *West*, for the respondents.—By stat. 16 & 17 *Vict. c. 97. s. 97.*, under which the order was made, two justices may inquire into and adjudge the settlement of a pauper lunatic confined in an asylum, and order the expences of the examination and maintenance to be paid by the guardians of the union or the overseers of the parish, as the case may be. But, by sect. 102, repealing sect. 5 of stat. 12 & 13 *Vict. c. 103.*, all such expences in the case of a pauper lunatic “who would, at the time of his being conveyed to such asylum &c.,

have been exempt from removal to the parish of his settlement &c.," "shall be paid by the guardians of the parish wherein such lunatic shall have acquired such exemption if such parish be subject to a separate board of guardians, or by the overseers of such parish where the same is not subject to such separate board, and where such parish shall be comprised in any union the same shall be paid by the guardians, and be charged to the common fund of such union." Here the pauper lunatic was not emancipated, and therefore her removability depends on whether her surviving parent was removable or not. Her father was irremovable from *Manchester* at the time of his death, and if her mother had remained there the pauper lunatic would have been irremovable; but her mother having broken her residence, and thereby become removable, the pauper lunatic, when she left the asylum, was also removable, because she was unemancipated; *Regina v. The Inhabitants of Cudham* (a). In *The Overseers of St. Giles in the Fields*, appts., *Guardians of the Strand Union*, respts. (b), the pauper lunatic was exempt from removal at the time of his being conveyed to the asylum. *Regina v. The Overseers of Elvet* (c) may be relied on by the other side, but there both parents were dead at the time the order was made. The object of stats. 9 & 10 *Vict. c. 66. s. 1.* and 11 & 12 *Vict. c. 111. s. 1.* was to prevent the separation of members of the same family. [They cited *Rex v. The Inhabitants of Much Cowarne* (d), and referred to Lord Campbell's judgment in *Regina v. The Inhabitants of St. Ann, Blackfriars* (e).]

(a) 1 *E. & E.* 409.(b) 7 *Jur. N. S.* 161; *S. C.* 30 *L. J. M. C.* 12.(c) 5 *Jur. N. S.* 1350; 29 *L. J. M. C.* 17.(d) 2 *B. & Ad.* 861.(e) 2 *E. & B.* 440. 445.

1862.
 The QUEEN
 v.
 Overseers of
 St. MARY
 ARCHES,
 EXETER.

J. Kay and Hopwood, for the appellants.—First, the pauper lunatic was irremovable from *Manchester* at the time when she was sent to the workhouse, in *October*, 1858; and therefore, also, when she was sent to the asylum; because the time during which she received relief in the respondents' workhouse is to be treated for all purposes as if it had never existed: per Lord *Campbell*, in delivering the judgment of the Court in *The Overseers of Hartfield*, appts., *The Churchwardens of Rotherfield*, respts. (a), overruling *Regina v. The Inhabitants of Salford* (b). Stat. 16 & 17 *Vict. c. 97. s. 102.* mentions the time of the pauper lunatic being conveyed to the asylum as that at which his status of irremovability is to be ascertained. And stat. 12 & 13 *Vict. c. 103. s. 4.*, following stat. 9 & 10 *Vict. c. 66. s. 1.*, as to the exclusion of particular periods in the computation of the five years, enacts that the removal of any pauper lunatic to an asylum &c., and the removal of any pauper otherwise than under an order of removal from his place of abode in any parish of a union to the workhouse of such union, shall not be deemed to be an interruption of the residence of such pauper in respect of stat. 9 & 10 *Vict. c. 66.*; “but the time spent in such lunatic asylum &c. or workhouse &c. shall be wholly excluded from the computation of the time of the residence.” In *Regina v. The Guardians of the West Ward Union* (c) Lord *Campbell*, in delivering the judgment of the Court, said, stat. 12 & 13 *Vict. c. 103. s. 4.* expressly relates to the status of irremovability, “and was passed for the purpose of regulating liabilities as between parishes of residence and parishes of settlement.” [They also cited *Regina v. The Inhabitants of St. Leonard's, Shoreditch* (d),

(a) 17 *Q. B.* 746. 762.

(c) 7 *E. & B.* 21. 25.

(b) 12 *Q. B.* 106.

(d) 14 *Q. B.* 340.

and *Regina v. The Inhabitants of Potterhanworth* (a).] The mother of the pauper lunatic changed her residence, before the conveyance of the pauper to the lunatic asylum, and therefore the break of residence would have no effect upon the status of irremovability which the pauper lunatic had acquired in *Manchester*.

Secondly. The pauper lunatic is not within the proviso to sect. 1 of stat. 11 & 12 *Vict. c. 111.*, which repealed the proviso in stat. 9 & 10 *Vict. c. 66. s. 1.* The proviso in 11 & 12 *Vict. c. 111.* is, "Whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removable from any parish or place from which he or she would be removable, notwithstanding any provisions of the said recited Act; and should not be removable from any parish or place from which he or she should not be removable by reason of any provision in the said recited Act." This question always arises after expences have been incurred, which accounts for the peculiar language "should be removable" and "would be removable," which, in *Regina v. The Inhabitants of Cudham* (b), *Crompton J.* said he was unable to see the effect of. The proviso contemplates the father as living at the time, and has not provided for the alternative of his death, and therefore in that event the proviso does not limit the wide term in which the irremovability after five years' residence is conferred. The proviso applies only to the father; if it is understood as applying to the case where the mother happens to survive, and becomes the head of the family, the mother of the pauper lunatic had no settlement. Moreover, the word "children" in these provisoes was intended to refer to persons of tender

1862.

The QUEEN
v.
Overseers of
St. Mary
ARCHES,
EXETER.

(a) 1 *E. & E.* 262.

(b) 1 *E. & E.* 409. 413.

1862.

The QUEEN
v.
Overseers of
St. MARY
ARCHES,
EXETER.

years, and not to include a person of the age of thirty years. Further, upon the death of the father, the pauper lunatic has his settlement until the mother gains one in her own right. The policy of the Legislature, to prevent the separation of members of the same family, which the respondents insist upon, and which has been further carried out by stat. 24 & 25 Vict. c. 55. s. 2., will be frustrated if the pauper lunatic is removable to the appellant parish, while her mother, who is not chargeable, will remain where she is. [Cockburn C. J. When a man dies, his widow has his settlement. If she acquires a fresh settlement, the child's follows it; if not, the child retains that of the father, because the mother has it.] If the child, after the death of the father, continues to reside with the mother, it would, if unemancipated, follow the settlement which the mother acquired subsequently in her own right; but if the father was irremovable at the time of his death, and the child continues in the place of his residence, it is irremovable; *Regina v. The Overseers of Elvet (a)*. [Crompton J. In that case the child was emancipated, and never became a part of the mother's family; and the mother being dead, it could not follow her settlement as head of the family. When the mother becomes the head of the family, you say that they can be separated by a break of residence on the part of the mother. Cockburn C. J. If the child has not at the time of the death of the father acquired a status of irremovability, how can it have the benefit of the father's status of irremovability when the mother has become removable?] In *The Overseers of St. Giles in the Fields*, appts., *The Guardians of the Strand Union*, resps. (b),

(a) 5 Jur. N. S. 1350; 29 L. J. M. C. 17.

(b) 7 Jur. N. S. 161; 30 L. J. M. C. 12.

the pauper lunatic who had resided unemancipated with his father five years, and was then conveyed to the asylum, was held exempt from removal, though the father had broken his residence.

By stat. 24 & 25 *Vict. c. 55. s. 2.*, "Where a child under the age of sixteen years, residing with its surviving parent, shall be left an orphan, and such parent shall at the time of death have acquired an exemption from removal by reason of a continued residence, such orphan shall, if not otherwise irremovable, be exempt from removal in like manner and to the same extent as if it had then acquired for itself an exemption from removal by residence." The words "if not otherwise irremovable" can have no operation unless the child can acquire exemption from removal by residence, as in *Regina v. The Overseers of Elvet (a)*. [*Cockburn C. J.* A child may become emancipated in various ways. That statute applies to the case of a child both whose parents are dead. The status of irremovability survives, just as the settlement does.] The Legislature supposes that the death of the parent would cause removability and provides for the case in which the child would not otherwise be removable.

Thirdly. The pauper, though unemancipated, had acquired for herself a status of irremovability when she was conveyed to the asylum. She is not within the alternative in the proviso to stat. 9 & 10 *Vict. c. 66. s. 1.*, of a person having no other settlement than her own, for the case finds that the settlement of her father was in the appellant parish, and she would have her father's settlement. She had resided before and after his death more than five years in *Manchester*. In *Regina v. The Overseers of Elvet (a)*, Lord Campbell said, "There is
(a) 5 *Jur. N. S.* 1350; 29 *L. J. M. C.* 17.

1862.

The QUEEN
v.
Overseers of
ST. MARY
ARCHES,
EXETER.

1862.

The QUEEN
v.
Overseers of
St. MARY
ARCHES,
EXETER.

nothing to prevent an unemancipated child, able to work for its bread, from acquiring a status of irremovability," and "the mother of the pauper having died before she became chargeable, she did not lose the status of irremovability, or follow her mother's settlement." [Cockburn C. J. If those observations are taken to the full extent, an unemancipated child living in its father's family at the age of five years might acquire a status of irremovability; and this consequence would follow, that if the father changed his residence, and was removed to the place of his settlement, the child could not be removed with him.]

COCKBURN C. J. I am of opinion that our judgment should be for the respondents. The case turns upon the question whether, at the time the pauper lunatic was taken from the workhouse to the lunatic asylum, she was removable from *Manchester*, the respondent parish, to the place of her father's settlement, the appellant parish. The father of the pauper lunatic had acquired the status of irremovability by his residence in *Manchester*: on his death her mother, continuing to reside at *Manchester*, also had the status of irremovability. The pauper, an unemancipated child, residing first with her father and afterwards with her mother, became chargeable and was sent to the workhouse. It is admitted that the time which elapsed between her being sent to the workhouse and the time of making the order of adjudication on which the question arises, does not count so as to create irremovability from *Manchester*. The mother, prior to the time now under consideration, had removed from *Manchester*, and so had lost her status of irremovability; and the question therefore is, whether the pauper lunatic, being unemancipated, continued a member

1862.

The QUEEN
v.
Overseers of
St. Mary
ARCHES,
EXETER.

of her mother's family. I think she did. It is admitted that, during the time a child continues a member of the family of which either the father or mother, as the case may be, is the head, the residence of the child will not create in him or her a status of irremovability; and stat. 24 & 25 *Vict. c. 55. s. 3.*, by which, on the death of the father or mother, the prior residence with the surviving parent enures for the benefit of the child so as to create the status of irremovability, applies only to the case of a child under the age of sixteen years left an orphan. The question therefore resolves itself into this, whether the mother, if she became chargeable, would be removable. Clearly she would be, because she had broken her residence in *Manchester*. Then is there anything in stat. 9 & 10 *Vict. c. 66.* or in stat. 11 & 12 *Vict. c. 111.* to prevent the pauper lunatic from being removable? I think, though the proviso in the first statute is very obscure, and the proviso in the second, which was passed in substitution of the first, is still more so, the effect is that a child, so long as he or she continues a member of the parent's family, shall not acquire the status of irremovability until the death of the one or the other parent who was the head of the family, if that parent was removable. For as it might happen that the wife or children were irremovable, the statute intended to keep families together, and accordingly made the status of the children, if unemancipated, to follow that of the head of the family. In this case, if the mother became chargeable she might be removed to the appellant parish; and the object of the statute would be frustrated if we put on it the construction contended for by the appellants, and hold that the pauper lunatic could not be removed to the place of her father's settlement, or adjudicated to be

settled there. It seems absurd that a person of thirty years of age should still be treated as a child; but it is well established that for all purposes of settlement and relief an unemancipated child is to be considered a member of the family of the parent. Therefore the pauper lunatic, in respect of settlement and removability, follows the condition of the mother. The mother, by her break of residence in *Manchester*, has ceased to be irremovable; and therefore the pauper lunatic, being chargeable, may be adjudged to be settled in the appellant parish.

On the further question, whether an unemancipated child can acquire a status of irremovability in its own right, it is not necessary to come to any conclusion.

CROMPTON J. I also am of opinion that we best carry out the policy and meaning of the words of stat. 11 & 12 *Vict. c. 111. s. 1.*, which latter are very meagre, by holding that the status of irremovability of an unemancipated child follows the status of the head of the family, just as the settlement of such a child follows the changes of settlement of that head. Stat. 16 & 17 *Vict. c. 97. s. 102.*, which makes provision for the costs of the maintenance of a pauper lunatic who is exempt from removal, points distinctly to the time when the pauper lunatic is conveyed to the asylum, &c., as that at which the question arises whether he was exempt from removal. And that depends on stat. 11 & 12 *Vict. c. 111.*, which is a substitution for the proviso to sect. 1 of stat. 9 & 10 *Vict. c. 96.*, and gives the law upon the subject. [His Lordship read the 11 & 12 *Vict. c. 111. s. 1.*] In this case, the father having died, the mother became the head of the family, and the question is whether the pauper lunatic is not a

child within that proviso. The section could not refer to a dead person having a child; and the words "having no other settlement than his or her own," and "from which he or she would be removable," meet the case of the mother surviving the father. It is said that, in this case, the pauper lunatic has the settlement of the father, and not that of the mother, and that is true in one sense, because it is derived from the father; but the section applies to the case where a child has no other settlement than that of the mother in the sense in which the statute uses the expression, because it is dependent on and floats with hers. When the father is dead, the removability of an unemancipated child depends on that of the mother, who is the head of the family; and in this case the mother ceased to be irremovable before the child was conveyed to the asylum.

The two cases which were cited in support of the contention of the appellants, were not decided on a change of the status of the surviving parent of the pauper lunatic. In *Regina v. The Overseers of Elvet* (a), the mother was sent to the lunatic asylum before the father died, there was no change in her status of irremovability, and she was not the head of the family at the time of the order being made. *The Overseers of St. Giles, appts., The Guardians of the Strand Union* respts. (b), is still less applicable: the father having lost his status of irremovability after the pauper lunatic had been conveyed to the asylum, a question arose if the charge of maintaining the child should be thrown on the parish of settlement; and it was argued that it would be hard on a parish if, when the father's status

1862.

The QUEEN
v.
Overseers of
ST. MARY
ARCHES,
EXETER.

(a) 5 Jur. N. S. 1350; 29 L. J. M. C. 17.

(b) 7 Jur. N. S. 161; 30 L. J. M. C. 12.

1862.

The QUEEN
v.
Overseers of
St. MARY
ARCHES,
EXETER.

was changed, that of the child was not changed also ; but the Court said that it might be a *casus omissus*, or it might be the policy of the Legislature that such questions of chargeability should be settled at once. The expressions used by the Judges, about the child acquiring the status of irremovability of the father, are referable to the facts of that case.

Then it was argued that the time during which the pauper lunatic was in the workhouse was not only to be excluded from the computation of the five years which conferred the status of irremovability, but did not deprive her of the status she had acquired. But that argument does not affect the question whether the mother is removable ; and, the mother being removable, the case is within stat. 11 & 12 *Vict. c. 111.*, and the status of an unemancipated child having no other settlement than that of the parent, is to follow the status of the head of the family just as the settlement does.

We must decide the case according to the law as it was before stat. 24 & 25 *Vict. c. 55.* ; but I think that sect. 3 of that statute does not alter the law ; it rather presumes that the status of removability or irremovability of the child would float with that of the surviving parent.

MELLOR J. was not in Court during the argument on the first day, and therefore took no part in the judgment.

Order confirmed.

The QUEEN *against* The Vestry of ST. LUKE'S, *Wednesday,*
CHELSEA. *January 22d.*

Mandamus.
Metropolis
Local Manage-
ment Act,
18 & 19 Vict.
c. 120. s. 69.
Sewers.
Vestry.

The Metropolitan Local Management Act, 18 & 19 *Vict. c. 120. s. 69.*, enacts, that the vestry of every parish mentioned in Schedule A. shall make such sewers as may be necessary for effectually draining their parish: provided that no new sewer shall be made without the previous approval of the Metropolitan Board of Works. Mandamus to the vestry of one of these parishes, commanded them to make such sewers as might be necessary for draining a particular part of the parish, and to take all necessary steps in that behalf: held defective: first, because it did not shew a present duty to make the sewers; secondly, because it ordered the defendants to make them without shewing that the approval of the Metropolitan Board had been obtained.

MANDAMUS to the vestry of the parish of *St. Luke, Chelsea*, in the county of *Middlesex*, recited that the parish of *St. Luke, Chelsea*, was a parish mentioned in Schedule A. to stat. 18 & 19 *Vict. c. 120.*, and that, after the passing and coming into operation of the said Act of Parliament, it became and was necessary, for effectually draining a certain part of the parish called *Limerston Street*, that the vestry should make certain sewers and works, and that the vestry were duly requested to make the said sewers and works by and on behalf of *Edward Wigan* and *John Alfred Wigan*, the owners of certain houses in the said street in the parish, whose property was greatly injured for want of such sewers and works for effectually draining the same, and to take all necessary steps in that behalf: but that the vestry had neglected and refused to make, and still did neglect and refuse to make, such sewers and works as might be and were necessary for effectually draining the said part of the parish, or to take all or any necessary

1862.

The QUEEN
v.
Vestry of
ST. LUKE'S,
CHELSEA.

steps or step in that behalf. The writ then commanded the vestry to make such sewers and works as might be necessary for effectually draining that part of the parish called *Limerston Street*, and to take all necessary steps in that behalf.

Return: that the said sewers and works were not necessary for effectually draining the parish of *St. Luke, Chelsea*, within the meaning of the said Act of Parliament, and that *Limerston Street* was a street formed after the passing and within the limits of stat. 8 & 9 *Vict. c. cxliii.*, "For better paving, lighting, cleansing, regulating and improving the parish of *St. Luke, Chelsea* (exclusive of the district of *Hans Town*), in the county of *Middlesex*," and that the said street was never sufficiently paved, flagged, stoned, gravelled, levelled, drained and sewered to the satisfaction of the Commissioners for putting the last mentioned Act into execution, and had never been sufficiently paved, flagged, stoned, gravelled, levelled, drained and sewered to the satisfaction of the vestry since the coming into operation of the Act for the better local management of the metropolis, and that it was the duty and obligation of the respective owners of the houses and tenements adjoining or abutting on the said street on each side thereof, subject to the directions contained in the last mentioned Act, and in the Act for the better local management of the metropolis, and in the bye-laws made and published by the Metropolitan Board of Works under and pursuant thereto, at their own respective charges and expences, to well and sufficiently pave, flag, stone, gravel, level, drain and sewer so much of the said street to the centre thereof as was opposite to and co-extensive with their respective houses or tenements adjoining or abutting on such street. And

that *Limerston Street* was a road or way set out by and at the expence of private parties for the use and accommodation of certain private property near thereto, partly built and partly unbuilt upon ; that the soil of the said road or way was private property ; that the said road or way was not a highway repairable by the inhabitants of the said parish, and had never been paved or made in a proper or substantial manner ; that a large portion of the land abutting on the said road or way was unenclosed building land, upon which no houses had been erected, or begun to be erected ; that the said road or way was not a street within the meaning of the Act of Parliament for the better local management of the metropolis ; that there was, in a certain part of the parish of *St. Luke, Chelsea*, (to wit) in the *King's Road*, near to the said road or way called *Limerston Street*, a public sewer vested in and cleansed and maintained by the vestry, conveniently situated and well adapted as an outlet for the drainage of the said road or way, and of the houses and land abutting thereon ; and the vestry were ready and willing, subject to the previous approval of the said Metropolitan Board of Works, to permit the respective owners of the said road or way, and the said houses and land, at their own costs and charges, to drain the same into the said public sewer in the *King's Road*. And that the vestry were not by law liable or bound, under or by virtue of the Act of Parliament for the better local management of the metropolis or otherwise, to cause to be made the said sewers and works.

And that the vestry had, from the time of the passing of the Act for the better local management of the metropolis, exercised a reasonable discretion and judgment in causing to be made such sewers and works as were in

1862.

The QUEEN
v.
Vestry of
St. LUKE'S,
CHELSEA.

1862.

The QUEEN
v.
Vestry of
St. LUKE'S,
CHELSEA.

their judgment from time to time necessary for effectually draining the said parish, and that they had, in the exercise of such reasonable discretion and judgment, and with the previous approval of the Metropolitan Board of Works, in manner directed by the Act for the better local management of the metropolis, caused to be made divers sewers and works in and for the drainage of the parish, which sewers and works were all the sewers and works which the vestry, in the exercise of such reasonable discretion and judgment, had deemed it expedient and proper to cause to be made before and at the time of the issuing of the writ, or at any time since, in execution of and for the purposes of the Act for the better local management of the metropolis.

And that the sums required for causing to be made and completed the several sewers and works necessary for effectually draining the whole of the parish would amount to a very large sum, to wit, to a sum exceeding 12,000*l.*, and that the moneys in their possession or control before and at the time of the issuing of the writ, or at any time since, were wholly inadequate and insufficient to defray the costs of making and completing such sewers and works, and that the vestry could not, otherwise than by making and levying rates wholly exorbitant and unreasonable in amount, and vexatious and oppressive to the ratepayers of the parish, raise sums which would be sufficient to defray the cost of making and completing the said sewers and works, and also to meet the costs, charges and expenses to which sewers rates, leviable within the parish, were then liable by law, that is to say, the costs and charges of and incident to the cleansing, repairing, maintaining and managing the existing sewers in the parish vested in the vestry, the pay-

ment of the interest and portions of the principal of the mortgage debts of the late Metropolitan Commissioners of Sewers, contracted under The Metropolitan Sewers Act, 1848, and the Acts for continuing and amending the same, and charged under the said Acts upon the parish, amounting to 822*l.* 10*s.* 5*d.*, and the payment of the amounts required by the precepts of the Metropolitan Board of Works, and payable by the vestry for and towards the expences of the Board in the execution of the said Act of Parliament, and for raising moneys for the metropolis main drainage rate, under and pursuant to stat. 21 & 22 *Vict.* c. 104., for altering and amending the Metropolis Local Management Act, 1855, and extending the powers of the Metropolitan Board of Works for the purification of the *Thames* and the main drainage of the metropolis.

First plea, to the whole return, that the sewers and works in the writ mentioned, and thereby commanded to be made, were necessary for effectually draining the parish, within the meaning of the Act of Parliament in the writ mentioned.

Issue thereon.

2. Demurrer to the whole return, except the statement above traversed in the first plea.

Joinder therein.

3. Plea: as to the whole return, except the statement traversed in the first plea, that the vestry had not made any order that the said street, called *Limerston Street*, should be sewered, pursuant to the local Act in the return referred to; and that divers of the owners of the houses and tenements adjoining or abutting on the said street, on each side thereof, had refused, at their own expense or charge, respectively, to sewer any part of the said street,

1862.

The QUEEN
v.
Vestry of
ST. LUKE'S,
CHELSEA.

1862.

The QUEEN
v.
Vestry of
St LUKE'S,
CHELSEA.

of which the vestry had notice long before the issuing of the writ; and the other owners of the houses and tenements adjoining to or abutting on the said street, willing to sewer such part of the said street as was opposite to and co-extensive with their respective houses or tenements adjoining or abutting on the said street, could not make the sewers and works mentioned in the said mandamus: of all which the vestry had notice long before the issuing of the writ, and before the request in the writ mentioned.

Demurrer, and joinder therein.

The *Attorney General* (with him *D. Keane*), for the prosecutors.—The question as to the sufficiency of the writ depends on the construction of sect. 69 of The Metropolis Local Management Act, 18 & 19 *Vict. c. 120*. By that section “The vestry of every parish mentioned in Schedule A. to this Act, and the Board of Works for every district mentioned in Schedule B. to this Act, shall (subject to the powers by this Act vested in the Metropolitan Board of Works) from time to time repair and maintain the sewers under this Act vested in them, or such of them as shall not be discontinued,” &c., “and shall cause to be made, repaired, and maintained such sewers and works, or such diversions or alterations of sewers and works, as may be necessary for effectually draining their parish or district,” &c. “Provided always that no new sewer shall be made without the previous approval of the Metropolitan Board of Works.” The necessity for these sewers being admitted by the demurrer, it is the duty of the defendants to make them or take the necessary steps for making them. Sect. 158 gives the defendants ample power of raising the money

The QUEEN
v.
Vestry of
St LUKE'S,
CHELSEA.

required for the construction of sewers, and sect. 159 enables them to exempt parts of the parish or district not benefited by the execution of the works. The last part of the return asserts that the making of these sewers is in the discretion of the defendants; but the terms of sect. 69 are imperative. The words are, "such sewers and works as may be necessary," not "such sewers and works as shall in the exercise of their discretion be deemed necessary." That part of the return does not shew that the defendants have taken any steps towards making these sewers: if it is sufficient, the duty may be indefinitely deferred. [*Crompton J.* The general necessity for these sewers is admitted by the demurrer, but the defendants, in effect, say in their return that they have expended all that they could reasonably raise by rates in the construction of other sewers.]

Sect. 69 makes the approval of the Metropolitan Board of Works necessary for making these sewers; but the writ only calls upon the defendants to "take all necessary steps in that behalf." If they had returned an order of the Metropolitan Board, in such terms that they could not have made the sewers without violating that order, it would have been an answer to the writ. The defendants cannot exonerate themselves from the discharge of a duty which the Act of Parliament has thrown upon them, by omitting to apply for the approval of the Metropolitan Board, which they might obtain if they applied for it.

[He also argued that the first part of the return was no answer to the writ, inasmuch as the provisions in the local Act did not protect the vestry if they were otherwise bound to make these sewers. He also referred to sects.

1862.

The QUEEN
v.
Vestry of
ST. LUKE'S,
CHELSEA.

90, 92, 93, 96 and 247 of stat. 18 & 19 *Vict. c. 120.* and sects. 95 and 96 of stat. 8 & 9 *Vict. c. clxiii.*]

Sir *F. Kelly* (with him *Welsby*), for the defendants.—
First. Sect. 69 of stat. 18 & 19 *Vict. c. 120.* contains a general declaration of the powers conferred and duties imposed upon vestries and district boards, one of which is that of effectually draining the parish or district. But the order in which the works necessary for that purpose are to be executed is left in their discretion, as from the necessity of the thing it must be, subject to the control of the Metropolitan Board of Works, given by sects. 137, 138. The writ does not shew that, in the exercise of the discretion of the defendants, these sewers ought to be made; nor does it shew that the making of them is necessary for draining the whole parish.

Secondly. A mandamus will not lie to order a person or body of persons to do an act which cannot lawfully be done unless something has been previously done by a body over which the person or persons commanded to do the act have no control. The first proviso in sect. 69 is that “no new sewer shall be made without the previous approval of the Metropolitan Board of Works:” it does not say who is to obtain or apply for that approval. This objection is not removed by the insertion of the words in the writ “to take all necessary steps in that behalf,” because those words follow the order to make the sewers. But suppose they were in the beginning of the mandatory part of the writ, there has been no request to the defendants to take the step of applying for the approval of the Metropolitan Board. And if an application for the

approval of that Board is one of the necessary steps, it shews that there must be a discretion in the vestry, for they could not be required to apply for the approval of the Metropolitan Board to execute works which they themselves thought to be inexpedient.

1862.

The QUEEN
v.
Vestry of
ST. LUKE'S,
CHELSEA.

As to the return, it amounts to this, that the defendants have done all that they deemed necessary, and all that they had the means of doing. [*Crompton J.* The prosecutors must shew that it is the duty of the defendants to levy additional money by rates for making these sewers, though the rates are already exorbitant.] He was then stopped.

The *Attorney General*, in reply.—The writ is sufficient, as it shews that the sewers commanded to be made are necessary for draining this particular part of the parish. But it does not appear that the drainage of the whole parish would not be completed by draining this street; that other parts of the parish, which require to be drained first, are not drained, would be matter of return, being especially within the knowledge of the defendants. [*Cockburn C. J.* There may be a greater necessity for draining other parts of the parish than for draining this part. It is not enough for the writ to shew that a statutory duty is imposed and is unperformed; it must go on to shew that the party has had an opportunity of performing it. *Crompton J.* There is another insuperable objection to the writ—that it commands the defendants to do an act, the doing of which depends upon a contingency.] The averment in the writ, that the vestry were duly requested to make the sewers, but that they had refused to make them, must be construed to mean that they were requested to take the proper steps for

1862.
 The QUEEN
 v.
 Vestry of
 St. LUKE'S,
 CHELSEA.

making them, and, among other things, to apply to the Metropolitan Board of Works for their approval. [*Crompton J.* The peremptory mandamus must follow the form of the mandamus, and would command the defendants to make the sewers if they could obtain the approval of the Metropolitan Board.] It may be that the defendants have obtained that approval; and the Court will not assume that the Metropolitan Board will not give their approval if there is a necessity for the works, while they reserve their control over the mode of constructing the sewers, given by sects. 137, 138. The Metropolitan Board can order a sewer to be made, but cannot expend any funds upon the expence of making it. [*Cockburn C. J.* The Metropolitan Board have a control over the local drainage merely to prevent its interfering with the main drainage. *Crompton J.* I give no opinion on the power of the Metropolitan Board under sects. 137, 138.]

COCKBURN C. J. I am of opinion that the writ is defective. In order to constitute a sufficient writ there ought to appear upon the face of it a present duty to be performed, and a non-performance of such duty. This writ only states a general duty in the vestry to make the works in question, and does not shew that in the particular instance it is a present duty to make them. By stat. 18 & 19 *Vict. c. 120.*, an absolute duty is imposed upon the vestry to take steps for the drainage of their parish; and that involves the duty of draining all parts of their parish. But sect. 69 must be construed with this necessary qualification, that a reasonable time must be allowed for the discharge of the duty; and when we consider the magnitude of the works to be done in so

extensive a parish as this, and the large funds required for the completion of the works, it is clear that there must be vested in the body upon whom the performance of the duty is cast some discretion as to the measures to be taken, and with reference to the greater degree of exigency for the works in one district, as compared with another. They have a limited fund out of which the expences are to be defrayed; and, though they have a power to levy rates, they must, as a public board, exercise it with a view to what is right and reasonable; and in expending the money so raised they must have a discretion as to what part of the parish they will drain first, and what works should have priority of execution. In this case, admitting the necessity of the works, yet the vestry may have been properly of opinion that other parts of the parish ought to be drained first; and that, having regard to the funds in their hands, this part of the parish might wait. It is not enough to state that this particular part of the parish remained undrained, and that there was a necessity that it should be drained; it should be shewn that a reasonable time had elapsed, so that the draining that part was converted into a present duty.

Another objection to the writ is, that it orders the defendants to perform a duty which is conditional upon their obtaining the approval of the Metropolitan Board of Works, and it orders them to apply for that approval. I am not aware of any case in which this Court has issued such a mandamus. There can be no return to a peremptory mandamus except performance: if the defendants returned that they had applied to the Metropolitan Board, and that their approval had not been given, they would be involved in serious difficulties.

1862.

The QUEEN
v.
Vestry of
ST. LUKE'S,
CHELSEA.

1862.
 The QUEEN
 v.
 Vestry of
 ST. LUKE'S,
 CHELSEA.

Though there is a strong argument, *ab inconvenienti*, that this doctrine enables the defendants to avoid the duty, and tends to destroy the effect of the statute, the mischief may be met by issuing two writs of mandamus. But it is not necessary to decide that point.

These objections to the writ being fatal, it is not necessary to go into the questions on the demurrers to the return and the pleas.

CROMPTON J. Since the power was granted of taking proceedings in mandamus to a Court of error, it has been decided by the Court of Exchequer Chamber that, upon the pleadings in mandamus, the writ may be questioned by shewing that the title which is set out does not warrant the mandatory part of the writ. The question therefore is, whether the mandatory part of this writ is sustained by the title made by the suggesting part. The writ does not follow the words of sect. 69 of stat. 18 & 19 *Vict. c. 120.*, by ordering the defendants to make such sewers and works as may be necessary for effectually draining the parish, but it selects a particular part of the parish, and orders the defendants to make such sewers and works as may be necessary for effectually draining that part; and it does not shew that this part ought to be drained in priority of others. The statute contemplates a series of works for draining the parish; and it is absolutely necessary that the vestry should have a discretion as to the order and time in which those works should be done: that discretion is taken away by this writ. And, there being this objection to the writ, it cannot be objected to the return that it does not shew that other parts of the parish ought to have a priority over this part. The writ does not command the defendants to drain those particular parts

of the parish which according to their sound discretion ought to be drained first, but it commands them to drain this particular part without shewing that it ought to be drained now. I adhere to what I and my brother *Blackburn* said in *The Queen v. The Southampton Commissioners* (a), that the writ of mandamus may be general. Still title must be shewn; and this writ does not shew a present duty.

The writ is also defective in this, that no absolute duty is imposed on the vestry to do the works in question: they cannot do them without the approval of the Metropolitan Board. The Attorney General says, that the duty which the writ charges on the defendants is, to go to the Metropolitan Board and obtain their approval to this sewer being made. I do not think so. When a writ issues for the election of a public officer, it orders the parties to proceed to elect, and to take all necessary steps for such election; but those are matters which do not depend on the will of another person. This writ commands the defendants to make the sewers in the first instance. Suppose they obeyed the writ as far as they could, but had not got the approval of the Metropolitan Board of Works, they would be probably ordered to apply for that approval. But the proper course would be to issue a writ to the vestry to apply to the Metropolitan Board of Works for their approval, and, that having been obtained, to issue another writ to the vestry to make the sewers.

MELLOR, J. Stat. 18 & 19 *Vict. c. 120.* imposes a duty upon the vestry which involves the performance, not of one work, but a series of works of sewerage. It

(a) *Ante*, pp. 5, 25, 27.

1862.
The QUEEN
v.
Vestry of
ST. LUKE'S,
CHELSEA.

is conceded that, in general, the vestry have a discretion as to the order, the time and the manner in which the works are to be performed. But the writ takes that away; and is therefore vicious for not shewing that in this particular instance the vestry have no discretion.

I am also of opinion that it is a fatal objection to the writ that it commands one body of persons to do works the doing of which is conditional on the approval of another body of persons.

Judgment for the defendants.

Friday,
January 17th.

NICHOLL and others *against* ALLEN.

Mandamus.
Consent of
parties.
Proprietor of
public bridge.
Liability to
repair.

1. When a special case is stated for the opinion of the Court, and the parties agree that, in the event of the Court giving judgment for the plaintiff, a *mandamus* may issue against the defendant: Held, by the Exchequer Chamber, that this must be understood to mean if the Court thinks fit that it shall do so.

2. So if the agreement had been that a *mandamus* *shall* issue; dubitante *Willes J.*

3. The stat. 20 G. 2. c. 22., reciting that it was convenient that a bridge should be built across the *Thames* from the parish of *W.* in the county of *S.* to the parish of *S.* in the county of *M.*, for the ease and commerce of the inhabitants of the said counties, and that *S. D.* had proposed to build the bridge, enacted that it should be lawful for *S. D.*, his heirs and assigns, and he and they were authorized and empowered, at their own costs and charges, to build the said bridge. Power was given to cut the banks of the river, and turn any highways leading to the intended bridge; and in consideration of the great charges and expences *S. D.*, his heirs and assigns, should be at, not only in building the bridge but also in erecting, repairing and maintaining other matters necessary to be erected, it should be lawful for *S. D.*, his heirs and assigns, from time to time and at all times thereafter, to take for pontage or toll for any passage over the bridge, certain sums. A clause reciting that it might happen that the passage of the bridge might for some time become dangerous or impracticable, enacted that it should be lawful for *S. D.*, his heirs and assigns, to provide and maintain a ferry across the river, and to take the same sums for passage over the river by it as were granted for the toll or pontage: provided that such ferry should not continue longer than should be necessary for repairing or rebuilding the bridge. It was declared that the bridge should be extra-parochial, and not be deemed to be a county bridge. The stat. 20 G. 3. c. 32., reciting that the bridge was in a ruinous condition, and, if not effectually repaired or rebuilt, would be manifestly to the inconvenience of the public, and that *M. D. S.* was the sole proprietor of it, and had proposed to effectually repair or rebuild it, but it had been found by experience that the pontage or toll was greatly inadequate to the expence of building and keeping the same in repair, enacted that it should be lawful for

M. D. S., his heirs and assigns, to take the tolls therein specified. This latter Act also contained a clause re-enacting all the powers and authorities given by the former Act for the purpose of "rebuilding, repairing, altering and keeping in repair the bridge." In 1859 the principal arch of the bridge (which had been used by the public on payment of the tolls authorized by the said Acts) fell in, and the passage of it became impracticable. The defendant, who had become proprietor of the bridge in 1829, thereupon provided and maintained a ferry across the *Thames* near to the bridge, and for passage over the river by the ferry took the tolls authorized by the Acts. A reasonable time for repairing the bridge having elapsed, the plaintiff, who was the proprietor of an estate near the bridge and had sustained special damage as such from the neglect to repair it, brought an action against *M. D. S.* for damages, by reason of the bridge being impracticable. Held, by this Court, and affirmed by the Exchequer Chamber, that the above statutes imposed upon the defendant, as proprietor of the bridge, the duty to repair and maintain it as long as he received the tolls.

1862.

 NICHOLL
v.
ALLEN.

THIS was an action, brought by the plaintiffs against the defendant, for the recovery of damage sustained by them by reason of the passage of the bridge herein-after mentioned being impracticable, and for a mandamus commanding the defendant to repair and reinstate the bridge, and maintain the same in a fit state for passage; and the following case was stated, without pleadings, according to The Common Law Procedure Act, 1852, 15 & 16 *Vict. c. 76.*

In the 20th *George* Second an Act of Parliament was passed, intituled "An Act for building a bridge across the river *Thames*, from the parish of *Walton-upon-Thames*, in the county of *Surrey*, to *Shepperton*, in the county of *Middlesex*." Shortly after the passing of this Act the bridge thereby authorized to be built was, under and by virtue of the powers therein contained, built by *Samuel Dicker Esq.* in the said Act mentioned. In the 20th *George* Third another Act was passed for enlarging the powers of this Act. (Both of these Acts were to be referred to as part of the case (a).) From the time of the bridge being built

(a) The following sections of stats. 20 *G. 2. c. 22.* and 20 *G. 3. c. 32.* are material.

Stat. 20 *G. 2. c. 22.* "Whereas it is convenient that a bridge should

1862.

NICHOLL
v.
ALLEN.

until it became impassable as hereinafter mentioned, no repairs were required for, nor were any done to the

be built cross the river of *Thames*, from the parish of *Walton-upon-Thames*, in the county of *Surry*, to the opposite shore in the parish of *Shepperton*, in the county of *Middlesex*, for the better ease and commerce of the inhabitants of the said counties respectively and the parts adjacent; and whereas *Samuel Dicker*, of *Walton-upon-Thames*, in the said county of *Surry*, Esq., hath proposed to build the said bridge cross the said river for the purposes aforesaid, whereby many mischiefs and inconveniences will be remedied, and great advantages accrue to the public," it is enacted, "that it shall and may be lawful to and for the said *S. Dicker*, his heirs and assigns, and he and they are hereby authorized and empowered, and shall have full power and authority, by virtue of this present Act, at his and their own proper costs and charges, by himself and themselves, his and their deputies, agents, officers, workmen, servants and others, to build the said bridge from *Walton-upon-Thames* to *Shepperton* aforesaid; and that for the purposes aforesaid he and they shall have full power and authority, by himself and themselves, his and their servants, agents, workmen and others, to remove any shelf or shelves, or to deepen or widen the said river of *Thames*, or any ayts or stops in the same, between the parishes of *Walton-upon-Thames* and *Shepperton* aforesaid, and to dig or cut the banks of the said river *Thames* in such manner as shall be necessary and proper for the building of the bridge, and the navigation and passage of boats, barges, lighters and other vessels, and for the more convenient and better carrying on and effecting the said undertaking, and making the navigation of the said river *Thames* more easy for the said boats, barges, lighters and other vessels as aforesaid under or to and from such bridge when built (be it the soil or ground of the King's most excellent Majesty, his heirs or successors, or of any other person or persons, bodies politick or corporate whatsoever), and also to cut, remove and take away all trees, roots of trees, beds of gravel, sand or mud, or any other impediment whatsoever, which may any way hinder the said navigation, either by obstructing the sailing, haling, towing or drawing boats and vessels, with men or horses or otherwise, upon the said river of *Thames*, between the said parishes of *Walton* and *Shepperton*, and to build, erect and set up, and to make in, over or on the said river and lands adjoining or near to the same, any camp-shot, trenches and landing places, and to amend, alter, remove, or heighten any foot bridge, foot paths or horse paths, or to turn or alter any highways in upon or near unto the said river leading to the said new intended bridge, within the parishes of *Walton* and *Shepperton* aforesaid, so as not to stop up any common highway leading to, from, or through

structure of the bridge, save those contemplated by the Act of 20 *G.* 3.; but all other repairs required for

1862.

NICHOLL
V.
ALLEN.

either of the towns of *Shepperton* or *Walton*, and to appoint, set out and make any towing paths, banks and ways for towing, haling and drawing of boats, barges, lighters and other vessels passing in, through and upon the said river, under the said intended bridge, between the parishes of *Walton* and *Shepperton* aforesaid, or any part thereof: and from time to time and at all times hereafter to do all other matters and things necessary or convenient for making, maintaining, continuing and perfecting the said bridge, and the navigable passages under or near the same, or for the improvement or prosecution thereof, the said *S. Dicker*, his heirs and assigns, doing as little damage as may be, and first giving satisfaction to the respective owners and proprietors of such trees, ground, land, tenements or hereditaments as shall be pulled down, demolished, altered, dug up, cut, removed or otherwise made use of for every or any of the purposes aforesaid, or that in anywise shall be prejudiced or damaged by or for the carrying on the building, effecting, preserving and continuing or maintaining the said bridge, or the navigation near thereunto, and also giving satisfaction for all damages that shall be done, such damages to be ascertained in the manner hereinafter directed."

"And to the intent the navigation of the said river of *Thames* may receive no prejudice, be it further enacted by the authority aforesaid, that when the said bridge is built cross the said river, there shall remain free and open passage for the water to run and flow through the arches or passages under the said bridge, of two hundred and twelve feet at the least, within the present banks of the said river."

The Commissioners of Land Tax for the counties of *Middlesex* and *Surrey* are constituted and appointed Commissioners for settling all matters about any difference between *S. Dicker*, his heirs or assigns, and the proprietors, owners or occupiers of any such trees, lands, tenements or hereditaments; and if either of the parties shall not be satisfied with the determination of the Commissioners, the Commissioners are empowered to issue their warrant to the sheriff of the county of *Surrey* or *Middlesex*, as the case shall require, to impanel a jury for assessing the sums to be paid to every person or persons for the purchase of their estate and interest in the lands, tenements and hereditaments used for the purposes of the Act; and upon payment of the sum assessed by the Commissioners or agreed by the jury, as the case shall happen, "it shall then, and not before or otherwise, be lawful to and for the said *S. Dicker*, his heirs and assigns, to remove, pull down, cut, dig or use so much of the said trees, lands, tenements and other hereditaments and premises for which such satisfaction shall be so agreed, settled, assessed, adjusted or

1862.

NICHOLL
v.
ALLEN.

the maintenance of the bridge, and the roadway thereof, were from time to time done by the successive proprie-

decreed as aforesaid, for erecting, carrying on, supporting or maintaining the said bridge and navigation as shall be necessary and requisite, and to have, use and enjoy the same to and for his own proper use and benefit."

The Commissioners are empowered to fine either of the sheriffs, and his bailiffs making default in the premises, and persons summoned on juries or to give evidence, and not attending; "and all such fines are to be paid to the said *S. Dicker*, his heirs, executors or assigns, or to whom they shall appoint, to be employed towards carrying on, supporting, and advancement of the said bridge."

"And be it further enacted by the authority aforesaid, that for and in consideration of the great charges and expences that the said *S. Dicker*, his heirs or assigns shall be at, not only in building the said bridge, but also in making, erecting, repairing, cleaning, maintaining, keeping up, and continuing other matters necessary to be made and erected as aforesaid, it shall and may be lawful to and for the said *S. Dicker*, his heirs and assigns, and no other person whatever, from time to time and at all times hereafter, to ask, demand, receive, recover and take to and for his and their own proper use and behoof, in respect of his charges and expences as aforesaid, for pontage, or in the name of a toll or duty, for any passage over the said bridge, or any part thereof, the sums hereafter mentioned" &c.; "which said respective sums of money shall be demanded and taken in the name of pontage, or as a toll or duty; and the moneys to be received as aforesaid, and all other moneys to be received by the authority of this Act, are hereby vested in the said *S. Dicker*, his heirs and assigns, and the same and every part thereof shall be applied accordingly."

"And whereas it may so happen that the said bridge may, in times to come, receive such damage by unforeseen accidents, or by tempests or otherwise, that the passage thereof may for some time become dangerous or impracticable, be it further enacted by the authority aforesaid, that in all such cases it shall and may be lawful to and for the said *S. Dicker*, his heirs and assigns, from time to time as often as occasion shall require, to provide, maintain, and set up a proper and convenient ferry or ferries cross the said river of *Thames*, at such place or places as he or they shall judge to be most proper and convenient and as near to the said bridge as conveniently may be, and there to take for passage over the said river, by such ferry or ferries, such rates and duties as are granted by this Act for the toll or pontage aforesaid."

"Provided always, that such ferry or ferries shall not continue for

tors thereof; and, during all the time aforesaid, the bridge was used by the public for the purpose of passage on

1862.

NICHOLL

v.

ALLEN.

any longer time than shall be necessary for repairing or rebuilding the said bridge, or longer than the passage over the same shall or may be dangerous or impracticable as aforesaid.

"And be it enacted by the authority aforesaid, that the said bridge shall not be rated or assessed for or towards the land tax, the repairs of highways, poors rate, churchwardens' or any other parish rate whatsoever; nor shall the said bridge, or any part thereof, be deemed or looked upon to belong to, or be within any parish, but be extra-parochial to all intents and purposes whatsoever.

"Provided always, and it is hereby further enacted and declared, that the said bridge when built shall not be deemed or taken to be a county bridge, so as to subject the counties of *Middlesex* and *Surry*, or either of them, to the repairing or supporting the same."

Stat. 20 G. 3. c. 32. "An Act for enlarging the powers of an Act made in the twentieth year of His late Majesty King *George* the Second, for building a bridge" &c.

"Whereas by an Act, made in the twentieth year of the reign of His late Majesty King *George* the Second, intituled " &c., "several tolls, duties and powers were given and granted to *Samuel Dicker*, Esq., of the parish of *Walton*, in the county of *Surry*, to build a bridge cross the river *Thames* from the said parish of *Walton* to *Shepperton*, in the county of *Middlesex*: and a bridge was accordingly built and passable for many years: and whereas the said bridge is now in a ruinous condition, and if not effectually repaired or rebuilt, will be manifestly to the inconvenience of the publick: and whereas *Michael Dicker Sanders*, of the city of *Ereter*, is now sole proprietor of the said bridge, and hath proposed effectually to repair or rebuild the said bridge cross the said river, conformable to the powers and subject to the provisoes in the said above recited Act; but it having been found by experience that the pontage, toll, or duty for passing over the said bridge, or any part thereof, is greatly inadequate to the expence of building and keeping in repair the same," it is enacted, "that from and after the passing of this present Act, it shall and may be lawful to and for the said *M. D. Sanders*, his heirs and assigns, or such person or persons as shall be authorized and empowered by the said *M. D. Sanders*, his heirs and assigns, and no other person whomsoever, and he and they is and are hereby authorized and empowered, and shall have full power and authority by virtue of this present Act, from time to time and at all times thereafter, to ask, demand, receive, recover and take, to and for his and their own proper use and behoof, the tolls following, videlicet," &c.

1862.
NICHOLL
v.
ALLEN.

payment of the tolls by the said Acts authorized to be demanded and taken.

These tolls, and other the powers, privileges and immunities by the said Acts given and granted, have been received, exercised and enjoyed by the successive proprietors of the bridge from the time of the same having been built.

"And whereas by the said recited Act it is enacted, that after the said bridge should be built, two hundred and twelve feet should be left a free and open passage for the water to run and flow through the arches thereof: and whereas it is found necessary and expedient, for the better security of the said bridge, if the same shall be repaired, or it shall be found necessary to rebuild the same, to erect another pier in the said river; be it therefore enacted by the authority aforesaid, that two hundred and eight feet shall be left a free and open passage for the water to run and flow through the arches when the said bridge shall be effectually repaired, or, if found necessary, rebuilt.

"And it is hereby further enacted by the authority aforesaid, that the said *M. D. Sanders*, his heirs and assigns, shall have liberty to erect a temporary bridge near to the present bridge, whilst the same shall be repairing or rebuilding, provided that when the said temporary bridge is built, two hundred and eight feet shall remain a free and open passage for the water to run and flow through the arches or passages within the present banks of the said river."

"And it is hereby further enacted by the authority aforesaid, that the same pontage, toll, or duty shall and may be demanded, taken, and received for a passage over the said temporary bridge, as over the present bridge, or when the same is effectually repaired or rebuilt."

"And it is hereby further enacted by the authority aforesaid, that the said temporary bridge shall not be continued for any longer time than shall be necessary for repairing or rebuilding the present bridge."

"And be it further enacted by the authority aforesaid, that all and every the powers and authorities given and granted by the said recited Act (other than and except such as are hereby varied or altered) shall extend to, be applied, and put in execution, for the purpose of rebuilding, repairing, altering and keeping in repair the said bridge thereby directed to be built from the parish of *Walton-upon-Thames*, in the county of *Surry*, to *Shepperton*, in the county of *Middlesex*, as fully and effectually to all intents and purposes as if the said powers and authorities had been given, repeated, and re-enacted in the body of this present Act."

In or about the year 1829 the defendant became and was, and from thence hitherto has been, and still is, the proprietor of the bridge, and, as such proprietor, has received, exercised and enjoyed the said tolls, powers, privileges and immunities.

1862.

NICHOLL
v.
ALLEN.

On the 11th of *August*, 1859, the principal arch of the bridge fell in ; but whether in consequence of some original defect in the structure or foundation of the bridge, or for want of needful and necessary maintenance and repairs, has not been ascertained ; and by reason thereof, and of the damage or injury not having been in any way repaired or made good, the passage of the bridge became and was, and from thence hitherto has been, and still is, wholly impracticable. On the passage of the bridge so becoming impracticable, the defendant, under and by virtue of the powers in that behalf vested in him as the proprietor of the bridge by the said Acts, provided and set up, and from thence hitherto has maintained a ferry across the *Thames*, near to the bridge ; and for passage over the river by the said ferry he has demanded and taken, and still continues to demand and take, the tolls in that behalf authorized by the said Acts. A reasonable time for repairing and reinstating the bridge, and rendering the passage thereof practicable, elapsed before the commencement of this suit, and before the incurring of the damages by the plaintiffs for which this action is brought.

The plaintiffs are the owners of a considerable estate lying near to and on the *Middlesex* side of the bridge, and also of another considerable estate lying near to and on the *Surrey* side of the bridge, and have sustained damage by reason of the passage of the bridge being impracticable, and are personally interested in the bridge being

1862.

NICHOLL

v.

ALLEN.

repaired and reinstated and maintained in a state practicable for passage.

The question for the opinion of the Court is, whether the defendant, as the proprietor of the bridge, is, under or by virtue of the said Acts, bound to reinstate the bridge, and maintain the same in a state practicable for passage.

If the Court should be of opinion that the defendant is so bound to reinstate, then judgment shall be entered up for the plaintiffs for 40*s.* damages, and costs of suit; and a mandamus may issue commanding the defendant so to reinstate the bridge, that the same may become practicable for passage. If the Court should be of opinion that the defendant is not so bound, then judgment of nol. pros., with costs of defence, shall be entered up for the defendant.

Kemplay, for the plaintiffs.—The stats. 20 *G. 2. c. 22.* and 20 *G. 3. c. 32.* contain no express direction that the proprietor of the bridge shall repair it; but, looking at their purview and provisions, the duty of repairing it is cast upon him. [*Wightman J.* Suppose the bridge fell by unavoidable accident?] The defendant, as proprietor of the bridge for the time being, is placed in the same position of liability as a county is with reference to a county bridge. By stat. 20 *G. 2. c. 22.*, “It shall and may be lawful to and for the said *S. Dicker*, his heirs and assigns, and he and they are hereby authorized and empowered, and shall have full power and authority . . . at his and their own proper costs and charges . . . to build the said bridge.” The fines which the Commissioners are empowered to impose are to be paid to “*S. Dicker*, his heirs, executors or assigns, &c., to be employed towards carrying on, supporting, and advancement

of the bridge." The right to take toll for passing over the bridge is given to *S. Dicker*, his heirs and assigns, "in consideration of the great charges and expences *S. Dicker*, his heirs or assigns, shall be at, not only in building the said bridge, but also in making, erecting, repairing, cleaning, maintaining, keeping up, and continuing other matters necessary to be made and erected as aforesaid," "and the moneys to be received as aforesaid, and all other moneys to be received by the authority of this Act, are hereby vested in the said *S. Dicker*, his heirs and assigns, and the same and every part thereof shall be applied accordingly." It is provided that if the bridge receives such damage, by unforeseen accident or otherwise "that the passage thereof may for some time become dangerous or impracticable," "it shall and may be lawful to and for the said *S. Dicker*, his heirs and assigns, from time to time, as often as occasion shall require, to provide, maintain, and set up a proper and convenient ferry or ferries," &c.; "provided that such ferry or ferries shall not continue for any longer time than shall be necessary for repairing or rebuilding the said bridge, or longer than the passage over the same shall or may be dangerous or impracticable as aforesaid." There are clauses exempting the bridge from rates to which it would otherwise, as private property, be liable, and declaring that it shall not be deemed to be a county bridge.

Stat. 20 *G. 3. c. 32.* was passed, not on the ground that the proprietor of the bridge for the time being was not liable to repair the bridge, which was then in a ruinous condition, but because, as the Act recites, it had been "found by experience that the pontage, toll, or duty for passing over the said bridge, or any part thereof, is greatly inadequate to the expence of building and keep-

1862.

NICHOLL
v.
ALLEN.

1862.

 NICHOLL
 v.
 ALLEN.

ing in repair the same." This statute contains a clause by which a power is given to narrow the waterway of the river between the piers of the bridge when repaired or rebuilt; and all the powers given by the former statute are to extend to the "rebuilding, repairing, altering and keeping in repair the said bridge," as fully as if they had been re-enacted in that Act.

This case is not analogous to that of a railway, and therefore *The York and North Midland Railway v. The Queen* (a), in which it was held that a statute empowering a Company to make a railway did not impose an obligation on the Company to complete the line, does not apply. [*Crompton J.* Does this statute require the defendant to do more than expend the "pontage" upon the repair of the bridge?] The defendant is taking the toll for passing over by the ferry, which he has only a right to do while the bridge is being repaired, and for the purpose of repairing it. The bridge has become a public bridge; and, if the defendant is not liable to repair it, it will remain unrepaired, because stat. 20 G. 2. c. 22. removes the liability from the counties of *Middlesex* and *Surrey*. The duty to keep a bridge in repair, which had been built under the powers of an Act of Parliament, was implied in the following cases: *The King v. The Inhabitants of Kent* (b), *The King v. The Parts of Lindsey* (c), *The King v. Kerison* (d). He also cited *The King v. The Severn and Wye Railway Company* (e).

Lush, for the defendant.—The language of the two Acts is throughout permissive and empowering: there

(a) 1 E. & B. 858, reversing the judgment of the Queen's Bench.

(b) 13 East, 220.

(c) 14 East, 317.

(d) 3 M. & S. 526.

(e) 2 B. & Ald. 646.

1862.

 NICHOLL
 v.
 ALLEN.

is no such word as "require," which would of itself import an obligation. Therefore no obligation to repair the bridge arises. Clearly there was no obligation to build the bridge; no time being limited within which it should be built; and the language which empowers the building of the bridge is the same as that which empowers the repairing it. The second Act contains a clause re-enacting all the powers and authorities given and granted by the first Act "for the purpose of rebuilding, repairing, altering and keeping in repair the said bridge." If it had been intended that the proprietor should repair the bridge, the obligation would have been expressly imposed in the clause by which it was declared that the bridge should not be deemed to be a county bridge. The second Act recites that the bridge was in a ruinous condition, and that, if it was not rebuilt, the public would be inconvenienced, but it does not recite that the then proprietor was obliged to rebuild it. [*Mellor J.* The words of the Act are the words of the proprietor who obtained it. *Crompton J.* He, in effect, says to the legislature, "If you will give me increased pontage I will rebuild the bridge."] The former toll was inadequate to maintain the bridge, and therefore a greater toll was given. The proprietor may take toll as long as the amount of the tolls will enable him to keep the bridge in repair; but he is not bound to keep it in repair if they are not adequate. There was no highway across the *Thames* at this point before the bridge was built; and that distinguishes this case from those cited, and makes it analogous to *The York and North Midland Railway Company v. The Queen* (a). In that case *Jervis C. J.*, delivering the judgment of the Court, said, p. 861: "The words of the 3rd section of

(a) 1 E. & B. 858.

1862.

 NICHOLL
 v.
 ALLEN.

the Act of 1849, 'it shall be lawful for the said Company to make the said railway,' are permissive only, and not imperative: and it is a safe rule of construction to give to words used by the legislature their natural meaning, where absurdity or injustice does not follow from such a construction." [Crompton J. In each case we must look to the provisions of the Act of Parliament, and the subject-matter of it, in order to see whether the words "shall and may be lawful" are to be read as imperative or not.] In *The Queen v. The Inhabitants of Ely* (a) it was held that the primâ facie liability of the inhabitants of the county to repair a public bridge was displaced by a plea which shewed that the bridge was in a public highway over an artificial cut made across the highway for the use, profit and advantage of certain adventurers, that the necessity for the bridge was thereby created and the bridge in consequence constructed on the line of the former highway made by them, and the former highway was thenceforward carried upon the bridge; and Patteson J., in delivering the judgment of the Court, p. 841, referred to *The King v. The Inhabitants of Kent* (b) and *The King v. The Parts of Lindsey* (c) as decided upon the principle that the parties were empowered to alter the old highway for their own purposes on condition only of their leaving in its room another as good: which principle applies also to *The King v. Kerrison* (d). In *The King v. The Severn and Wye Railway Company* (e) the defendants, under the powers of their Act, made a tramroad, which was to be a public way, and, having taken up the rails, a mandamus was applied for to compel them to reinstate and maintain the tramroad:

(a) 15 Q. B. 827.

(b) 13 East, 220.

(c) 14 East, 317.

(d) 3 M. & S. 526.

(e) 2 B. & Ald. 646.

Abbott C. J. had considerable doubt, and after the judgment he recurred to the form of the rule and said, p. 652: "The writ should be to reinstate and lay down again, but not to maintain the tramroad." [*Wightman J.* The former part was all that was wanted at that time; it would have been useless to order the plaintiff to maintain the tramroad before it was relaid; and the Court would not assume that the defendants would not maintain it.] In that case the road had not become impassable for want of repair, but by the wrongful act of the defendants in taking it up. In *The King v. Llandilo (a)*, where trustees under an Act of Parliament turned a road through an enclosure, and made and repaired the fences of the road for several years, it was held that they could not be compelled to continue such repairs. [*Wightman J.* The repair of the fences on each side of the road is a very different matter from the repair of the road.] In *The King v. The Proprietors of the Birmingham Canal Navigation (b)* Lord Mansfield held that, from an authority in an Act of Parliament to make and maintain a canal, an obligation to do so was not to be implied. In railway Acts the same words are found, and larger powers are given than in these two Acts, and neighbouring property is greatly affected by the non-execution of those powers; but although the majority of this Court, in *The Queen v. The York and North Midland Railway Company (c)*, thought that an obligation to make and finish the line was to be implied, that was overruled in the Exchequer Chamber; and the principle of that decision of the Exchequer Chamber was affirmed in the House of Lords in *The Edinburgh, Perth and Dundee*

1862.

 NICHOLL
v.
ALLEN.

(a) 2 T. R. 232.

(b) 2 W. Bl. 708.

(c) 1 E. & B. 178, reversed on error, *Id.* 868.

1862.

 NICHOLL
 v.
 ALLEN.

Railway Company v. Philip (a). The toll allowed by these Acts is different from a toll or pontage at common law, in which case the obligation is mutual: the Crown is bound as well as the party, and could not derogate from its grant. Here Parliament might empower another person to build another bridge close to this. [*Wightman J.* The old law is thus stated in 2 *Inst.* 701: "None can be compelled to make new bridges, where never any were before, but by Act of Parliament." But in this case the question is whether there is not an obligation to repair so long as the defendant takes the toll. It is also said, "If a man make a bridge for the common good of all the subjects, he is not bound to repair it; for no particular man is bound to repair bridges by the common law, but *ratione tenuræ*, or *præscriptionis*," that is, where he so makes it *simpliciter*; but in this case the defendant gets the power to take an increased toll on the very ground that the first toll was inadequate "to the expense of building and keeping in repair" the bridge.]

The count for a mandamus cannot be sustained. If a mandamus lies, an indictment would lie. [*Wightman J.* Suppose a contract between two individuals, *A.* and *B.*, that *A.* should allow *B.* to pass over the bridge on payment of a toll, would not *A.* be liable to repair the bridge?] This Act of Parliament is not to be construed as a contract; *The York and North Midland Railway Company v. The Queen (b)*. There was no obligation on the defendant to set up the ferry; and he may be doing an illegal act in taking toll for passing over it, or in taking that toll for an unreasonable time, but that does not create an obligation on him to rebuild the bridge. [*Crompton J.*

(a) 2 *Macq.* 514.(b) 1 *E. & B.* 858. 864.

If the bridge was in a dangerous state, and a person passing over it was injured, would it be an answer to an action that the person need not have come upon it?] The defendant would be civilly liable only.

1862.

 NICHOLL
v.
ALLEN.

Kemplay was not called upon to reply.

COCKBURN C. J. was absent.

WIGHTMAN J. I am of opinion that our judgment ought to be for the plaintiffs; and that there was a duty cast upon the defendant to keep up the bridge, certainly as long as he received the toll given by the Acts of Parliament. It was admitted that the bridge became a public bridge. For the building of the bridge, and as it seems for keeping it in repair, the undertaker is entitled to receive, under the name of pontage, certain sums of money to be paid to him by those persons who pass over the bridge; and whenever it happens that the bridge, by unforeseen accidents, or by tempests, or otherwise, becomes dangerous or impracticable, the proprietor is authorized to provide and maintain a ferry, and to take, for passage over the river by the ferry, the same rates as were granted for the toll or pontage: provided that the ferry shall not continue for a longer time than shall be necessary for repairing or rebuilding the bridge, or longer than the passage over the same shall be dangerous or impracticable. That contemplates payment of toll during the time that the bridge is under repair and the public are passing over the river by the ferry, in lieu of pontage, which toll is the same as that paid when the bridge is passable. Therefore the defendant considers that he is taking these tolls

1862.

NICHOLL
v.
ALLEN.

during such time as is required for the repair of the bridge; and the tolls are taken for maintaining the bridge. It is said that though the public are charged with payment of the toll and the defendant continues to receive toll, no correlative duty is imposed upon him to maintain the bridge. But it seems to me that, looking at the whole of the two statutes, the proprietor of the bridge for the time being is entitled to receive toll in consideration of maintaining the bridge, and as long as he receives toll he is liable to repair it; and the defendant having received the tolls for the last thirty years and more while he has been in possession of the bridge as assignee, and even after the bridge has become impassable, he is bound to keep it up. The defendant seeks to treat the toll as a mere personal annuity to be applied to his own benefit without laying out any part of it in the repair of the bridge.

CROMPTON J. I am of opinion that the defendant is liable to repair the bridge as long as there is a bridge and he is the proprietor of it. The course taken in this instance for the protection of a public right is rather unusual. It is unusual to vest a public bridge in an individual, his heirs and assigns, and to attach an obligation to repair it to them; in general the obligation to repair a public bridge is attached to the owner of land, which is a liability *ratione tenuræ*. It is true, indeed, that in this case the person, who becomes proprietor of the bridge under the Act, becomes the owner of land on which the abutments and approaches of the bridge rest. The obligation to repair, under the Act, is upon *S. Dicker*, his heirs and assigns; that means, not his descendants only, but those who take from him, whether by inherit-

ance or assignment. I think, if he assigned the bridge to a beggar, his obligation would cease ; and it may be that, if the bridge were totally destroyed, his obligation would cease. Also there would be some difficulty if he abandoned the whole concern, or took the bridge down ; though it may be that he would be liable in respect of the land constituting the abutments and approaches. But the clear intent of the Acts of Parliament is that the proprietor of the bridge shall take the tolls for building and maintaining the bridge, and this only because he is bound to build and maintain it ; and, as my brother *Wightman* has said, duties and rights are correlative ; so that if the defendant takes toll or pontage from all persons passing over the bridge or by the ferry, he is bound to repair the bridge ; otherwise this would be the only instance of a public bridge without an obligation on any person to repair it. This is a clumsy way of attaching the obligation ; but so long as the assignee acts as proprietor of the bridge by taking tolls in respect of it, he is liable to maintain it in a state practicable for passage. That is the only question put to us.

1862.

NICHOLL
v.
ALLEN.

MELLOR J. At the time when the bridge was originally built, it was clearly in the contemplation of the party obtaining the Act, and of the legislature, that the tolls granted by it would be abundant compensation for building and maintaining the bridge. It would be absurd that nobody should be liable to repair a public bridge ; and the words of the Act are sufficient to carry out the intention of the legislature that the proprietor should do so. At first I doubted whether the second Act did not make against Mr. *Kemplay's* argument ; but, on looking at the recital, it appears that it had been

1862.

NICHOLL
v.
ALLEN.

found by experience that at that time the tolls were insufficient "to the expense of building and keeping in repair" the bridge, and increased tolls are given in aid of the proprietor for the discharge of his duty of building and keeping it in repair. The bridge is now out of repair and impassable; and it must be assumed that, while it is so out of repair, the defendant receives those increased tolls under the provisions of the Act, and not by extortion; and therefore I am of opinion that he is liable in this action.

Judgment for the plaintiff.

[Thursday,
June 19th.]

IN THE EXCHEQUER CHAMBER.

NICHOLL and others *against* ALLEN.

For head note, see *antè*, p. 916.

THE defendant having alleged error in the above judgment, the case was heard before *Erle C. J.*, *Pollock C. B.*, *Williams*, *Willes* and *Byles JJ.*, and *Channell B.*

Lush, for the defendant.—The statutes under which this bridge was constructed, 20 *G. 2. c. 22.* and 20 *G. 3. c. 32.*, contain no words imposing on the defendant an obligation to build or maintain it. For such a purpose compulsory words are necessary; *The York and North Midland Railway Company v. The Queen* (a), *The Edinburgh Railway Company v. Philip* (b). If the defendant was

(a) 1 *E. & B.* 858.

(b) 2 *Macquern*, 514.

authorized to construct the bridge for the benefit of the public, he could not take it away at his pleasure; *Regina v. The Severn and Wye Railway Company* (a); but that is not the case here; for if it were to fall down the public would be no losers, and would be as they were before it was built. [Pollock C. B. The fact of the defendant continuing to take the tolls which these statutes empower him to take shews that he has no intention of abandoning the bridge altogether.] Then, is the obligation to repair to last for ever? For he might abandon the tolls at any time. [Byles J. In the Court below, my brother Crompton suggests two ways in which he might be freed from the obligation; one is, if the bridge were totally destroyed; the other is, by assigning it to a beggar.]

Even if the Court should think the *action* maintainable, that part of the judgment which relates to issuing a *mandamus* ought to be reversed. To a peremptory *mandamus* the party cannot plead, and can return nothing but performance.

[At the close of this argument, the Court said that they were all of opinion that the *action* lay, and the only question was whether a peremptory *mandamus* could be granted to reinstate the bridge.]

Kemplay (*Hoggins* with him), for the plaintiffs.—No reason can be assigned why in this case an action should lie and a *mandamus* not. The duty imposed on the defendant by statute is to build the bridge, and reinstate it if necessary. These statutes must be looked on as a bargain between the defendant and the Legislature, whereby, in consideration of his building and maintaining the bridge for the use of the public, he is empowered

(a) 2 B. & A. 646.

1862.

NICHOLL
v.
ALLEN.

1862.

 NICHOLL
 v.
 ALLEN.

to interfere with their rights by diverting a public highway, taking land, and levying tolls. In 13 Co. 33, the law is thus stated:—"A bridge shall be levied by the whole country, because it is a common easement for the whole country; and as to that point, the stat. of 22 H. 8. c. 5. was but an affirmance of the common law: And this is true, when no other is bound by the law to repair it, but he who hath the toll of the men or cattle which pass over a bridge or causey, he ought to repair the same, for he hath the toll to that purpose, et qui sentit commodum sentire debet et onus." [Erle C. J. referred to *The Mayor and Burgesses of Lyme Regis v. Henley* (a).]

It was arranged between the parties here that a mandamus was to go if the Court considered the defendant bound to repair the bridge, and the Court below merely awarded a mandamus in accordance with that arrangement. This Court has therefore no discretion in the matter.

Lush, in reply, was stopped by the Court.

ERLE C. J. We all agree with the Court below that an action lies in this case. These statutes—20 G. 2. c. 22. and 20 G. 3. c. 32.—are merely permissive, and consequently, if the party chose, he might have held his hand and declined to act under them or take the benefit they offer him. But, having taken the benefit under them, it appears to me he took the burden with the benefit, for the statutes contemplated that both were to go together. I think that the case in the House of Lords of *The Mayor and Burgesses of Lyme Regis v. Henley* (a)

(a) 1 Bing. N. C. 222; 2 Cl. & F. 331.

is a strong authority in point. There a charter of the King granted to the corporation of a borough the borough in fee remitting to them also part of an ancient fee farm rent, and saying that the corporation should repair the buildings, banks, shores and all other mounds and ditches within the borough ; and it was held, after much litigation, that that charter, as it conferred a benefit, imposed an obligation to repair the buildings &c., so that an action lay against the corporation by an individual whose house had been injured by the sea, in consequence of the neglect of the corporation to repair the sea shore and mounds. And the Court relied on *Brett v. Cumberland* (a), where Queen *Elizabeth*, by letters patent, granted to a party a water mill for life, and those letters patent expressed the will of the Crown to be that the lessee and his assigns should sufficiently repair the said mill &c., and leave them sufficiently repaired. The lessee, having taken the premises under the grant from the Crown, took with them the obligation to keep them in repair, and an action lay against him for not doing it. So, here, the defendant took under these statutes the benefit of the tolls of this bridge, and consequently took also the burden of keeping it in repair. Now, the bridge having fallen down, and power being also given him to take tolls at the ferry while the bridge is out of repair, I am clear that during that time he has an obligation on him to take steps for repairing the bridge ; so that a party suffering special damage from his neglect in that respect, as it appears in this case the plaintiff has done, may maintain an action against him.

Then, as to the other question. The parties, it appears, have agreed that, if the defendant is liable to an action,

(a) *Cro. Jac.* 521.

1862.

NICHOLL
V.
ALLEN.

1862.

NICHOLL

v.

ALLEN.

a mandamus *may* issue directing him to reinstate the bridge. Now every Judge, when he authorizes the law to be put in force, is responsible for so doing, and therefore, before he does so, should see complete grounds for it. Although, therefore, the defendant here has put in his agreement that a peremptory mandamus *may* issue against him, I am bound to see that such a mandamus commanding him to repair this bridge,—for disobedience to which he would be liable to be attached, and, for aught I know, imprisoned for an indefinite time, which it would be beyond my power to prevent, though it might have the effect of ruining him and all connected with him, and yet not attain the object of the reinstatement of the bridge,—should not issue unless I can see good reason for it: which I do not.

I therefore think that the judgment of the Court below ought to stand as regards the action, but be reversed as to the mandamus.

POLLOCK C. B. I am of the same opinion.

WILLES J. I wish to say that at first I thought that, the parties having agreed in the manner suggested, this mandamus should issue. If that had been so, I could not have concurred with the rest of the Court in reversing the judgment as to issuing the mandamus. But, attending to the language used by the parties, which, so far as I can judge from the case, has been carefully selected, I think it was not the intention of the parties that on the Court giving judgment against the defendant respecting the action there should be a mandamus as matter of course. For the agreement is, "If the Court should be of opinion that the defendant is bound to reinstate, then judgment

shall be entered up for the plaintiffs for 40*s.* damages, and costs of suit, and a mandamus *may* issue commanding the defendant so to reinstate the bridge that the same may become practicable for passage." I cannot help thinking it clear that what the parties meant was that a mandamus might issue, not merely if the plaintiffs thought proper, but if some person capable of exercising a discretion as to whether it ought to issue, directed that it should.

I agree with my Lord Chief Justice that there is not enough here to warrant our saying that we must issue a peremptory mandamus, and entail such serious consequences on the defendant.

CHANNELL B. I concur with my Lord Chief Justice, and with his reasons. I guard myself from saying that no mandamus could have issued, and am not sure that the Court of Queen's Bench did not intend a mandamus to issue of a less extensive character than that here claimed.

BYLES J. It would be a monstrous thing if, because a plaintiff and defendant agreed to a judgment, we were bound to follow it.

ERLE C. J. My brother WILLIAMS, before leaving the Court, desired me to say that he concurs in the judgment I have given.

Judgment affirmed as to the action, and
reversed as to the mandamus.

1862.

NICHOLL

V.
ALLEN.

1862.

Thursday,
January 30th.

BLACKETT against BRADLEY and others.

Mine.
Right to sup-
port of surface.
Inclosure Act.
Prescription.
Custom.
2 & 3 W. 4.
c. 71.

Declaration alleged that the plaintiff was lawfully possessed of lands, yet the defendants so wrongfully, carelessly, negligently and improperly, and without leaving any proper or sufficient support, worked mines under the land, that great parts of it fell in, whereby the plaintiff's interest in the land was deteriorated, and a mare of the plaintiff was killed.

Third plea, as to working the mines without leaving any proper or sufficient support, that in the reign of *George the Second* an inclosure Act was passed, by which, after reciting that the lord of the manor of *W.* was seised of the soil of the commons, parcel of the manor, and of the coal mines under the same, and certain persons were entitled to the right of common in the commons, and being willing and desirous to improve their estates and properties, and that the said commons might be cultivated and improved, and rendered of some use and value, had agreed, with the consent of the lord, that the same should be enclosed, allotted and divided amongst them, it was enacted that the commons should be set out, awarded and divided accordingly; and that the lord should hold and enjoy the mines under the commons so to be allotted and divided, together with all convenient and necessary ways, and liberty of laying ways over the same, and of searching for and working the mines, as fully as if the Act had not been passed, without making any satisfaction for so doing; and after reciting that damage might be done to persons by reason of the searching and working the mines by the lord under their allotments, it was enacted, that when any person should sustain damage in his allotment by the searching for and working of the mines therein, or the laying of ways therein, compensation to be assessed by one or more justices of the peace should be made to him, and borne by the occupiers of the allotments in the same township. That the commons were allotted and divided under the said Act, and the land of the plaintiff was parcel of the said commons. That from time immemorial up to the passing of the Act, the lord and his assigns had been used and accustomed as of right to search for, win and work the mines under the commons without leaving any support for the lands under which the mines were situate, and without making any satisfaction for any injury caused by such working; and that from the time of passing the Act the mines had been so worked, without leaving any support; and that the defendants worked the mines under a lease thereof from the lord. On demurrer, held, that the plea was bad, such a prescription having been held void, as unreasonable, in *Hilton v. Earl Granville*, 5 Q. B. 701.

Fourth plea, as to working the mines without leaving proper and sufficient support, that the lord of the manor of *W.* was seised in fee of the mines within the manor, and that, for forty years next before the commencement of the action, the lord and his tenants had been used and accustomed of right to work the mines without leaving any support for the lands under which the mines were situate, and justifying the working of the mines as tenants to the lord in the exercise of the said right and custom. The fifth plea was similar, alleging the custom for twenty years. On demurrer, held that these pleas were bad, as they did not shew any acts done on the plaintiff's land; and acts done on the land of another, although done as of right for twenty or forty years, could not affect the plaintiff's rights.

1862.

BLACKETT
v.
BRADLEY.

THE declaration alleged that the plaintiff was lawfully possessed of certain lands in the township of *Lyne-sack* and *Softley*, in the county of *Durham*; yet the defendants so wrongfully, carelessly, negligently and improperly, and without leaving any proper or sufficient support in that behalf, worked certain mines under and beneath the said land of the plaintiff, that by reason thereof great parts of the said land fell in and sank, whereby the plaintiff was hindered and prevented from having the use, benefit and enjoyment of his land in so large and ample a manner as he otherwise would have done, and his estate and interest in the said land became and was greatly deteriorated and lessened in value, and a certain mare of the plaintiff, lawfully being upon his said land, fell into one of the holes made by the sinking and falling in of the said land as aforesaid, and was killed.

Third plea, as to working the said mines without leaving any proper or sufficient support, that before the plaintiff was possessed of the said land, and before and at the time of the passing of an Act of Parliament made and passed in the 31st year of the reign of His Majesty King *George* the Second, entitled "An Act for enclosing and dividing the moors and commons within the chapelry of *Hamsterley*, in the manor of *Wolsingham* and county of *Durham*," the Lord Bishop of *Durham*, in right of his church and see of *Durham*, was lord of the manor of *Wolsingham*, and, as such lord, was seised of or entitled to the soil of certain commons, moors or waste lands as being parcel of or belonging to the said manor, and was, as such lord, also seised of or entitled to certain coal mines lying and being in and under the said com-

1862.

BLACKETT

v.

BRADLEY.

mons, moors and waste lands; and certain persons in the said Act mentioned were, at the time of the passing thereof, entitled to the right of common in and upon the said commons, moors or waste lands, and had agreed among themselves, with the consent of the said lord, that the same should be enclosed, allotted and divided unto and amongst the several persons so entitled to such right of common, subject to such rents, charges, rules, orders and directions as are in the said Act mentioned and enacted. And thereupon, after reciting that the Right Reverend Father in God *Richard*, Lord Bishop of *Durham*, in right of his church and see of *Durham*, was lord of the manor of *Wolsingham*, in the county of *Durham*, and, as such, was seised of or entitled to the soil of the said commons, moors or waste lands, as being parcel of or belonging to the said manor; and that the Right Honourable *Henry* Earl of *Darlington &c.* and several other persons [naming them] were respectively owners and proprietors of several freehold lands or tenements situate, lying and being in the said townships, and also of several customary or copyhold lands or tenements, also situate, lying and being within the said townships, held of the manor of *Wolsingham* by copy of court roll, and the said several persons, their trustees, lessees, farmers or tenants, in respect of, or as appendant, appurtenant or belonging to, their said several lands or tenements, were entitled to a right of common in and upon the said commons, moors or wastes; and being willing and desirous to improve their estates and properties in the said townships, and that the said commons or waste ground might be cultivated and improved and rendered of some use and value, had proposed and agreed, with the consent of the said lord of the said

manor, that the same should be enclosed, allotted and divided unto and amongst the several persons entitled to such right of common thereon as aforesaid, and that a specific part or share thereof might be assigned and allotted to each person, to be held by them in severalty in such manner, with, under and subject to such rents, charges, rules, orders and directions as thereafter were mentioned ; and that such inclosure and division so proposed and agreed upon as aforesaid would not only be of great advantage to all persons interested in the premises, and tend greatly to the improvement of their several estates in the said townships, but would be also of public utility, yet the same could not be established and rendered effectual without the aid and authority of Parliament : it was by the said Act (amongst other things) enacted that the said commons, moors or waste lands should, before the 1st *November*, 1760, be set out, awarded and divided by certain Commissioners in the said Act named among the said persons so entitled as aforesaid. And it was thereby also further enacted, that nothing in the said Act contained should be construed to defeat, lessen or prejudice the right, title and interest of the lord of the manor of *Wolsingham*, of, in and to the seigniority and royalties incident and belonging to the said manor, but that every such lord for the time being should and might, from time to time, and at all times for ever thereafter, hold and enjoy all rents, services, courts, perquisites and profits of court, and all other royalties and seigniories whatsoever, to such manor or the lord thereof, for the time being, incident, belonging or appertaining (other than and except such common rights as could or might be claimed by him or them respectively as owners of the soil and inheritance of

1862.

BLACKETTV.
BRADLEY.

1862.
BLACKETT
v.
BRADLEY.

the said moors or commons or otherwise in or upon the said commons so to be enclosed), in as full and beneficial a manner to all intents and purposes as they or any of them could or might have held and enjoyed the same in case the said Act had not been made; and also that the said Lord Bishop of *Durham*, his successors and assigns, should and might at all times thereafter have, hold and enjoy all mines and quarries, of what nature or kind soever, lying and being in and under the said moors and commons so to be allotted and divided as aforesaid (other than and except certain quarries of stone), together with all convenient and necessary ways and way-leaves, and liberty of laying and repairing waggon ways and other ways, in, over and along the same or any part thereof, and of searching for, winning and working the said mines and quarries, and leading and carrying away the coals, lead, minerals, stones and other things to be gotten thereout, and making drifts, levels, water-courses, erecting and using fire engines and other engines, pit-rooms and other usual liberties, as fully and freely as he or they might or could have had or enjoyed the same in case the Act had not been passed, and that without making or paying any satisfaction for so doing. And after reciting that great inconveniences might happen and damage be done to particular persons by reason of the searching for, winning and working the mines and quarries within and under their respective allotments by the said Lord Bishop of *Durham*, his successors and assigns, without making or paying any satisfaction for so doing, it was by the said Act further enacted that when and so often as any person or persons should suffer or sustain any loss or damage in his or their respective allotments by

the searching for, winning and working of the mines and quarries therein, or the laying and repairing waggon ways or other ways, or by the leading and carrying away the coals, lead, minerals, stones or other things to be gotten thereout, or making drifts, levels or water-courses, or erecting or using fire-engines or other engines, pit-room or other the liberties and powers thereby given and reserved to the said Lord Bishop of *Durham*, his successors and assigns, upon complaint thereof made by such person or persons so damnified as aforesaid, to one or more justice or justices of the peace in and for the county of *Durham*, such justice or justices was and were thereby empowered and required to examine and inquire into such complaint or complaints in a summary way, and finally to settle and assess the damages sustained by such person or persons as aforesaid, which damages should be paid and borne by the occupiers of the several said allotments, lying and being in such and the same township in which the allotment or allotments in which such damages should be committed should be, according to the respective yearly values or rents of such allotments, in such proportion as such justice or justices should direct or appoint, and within such times as should be limited by the said justice or justices, with power to the said justice or justices to issue their warrant, under their or his hand and seal, for levying such proportion by distress and sale, in case the same should not be paid by the person or persons so liable to pay the same. That the said commons, moors or waste lands were, after the passing of the said Act, and before the 1st *November*, 1760, duly allotted, divided and enclosed, in pursuance of and according to the provisions of the said Act, and an award in pursuance of the said

1862.

 BLACKETT
 v.
 BRADLEY.

1862.
BLACKETT
V.
BRADLEY.

Act duly made by the said Commissioners, and that the land in the declaration mentioned was and is parcel of the said moors, commons and waste lands so enclosed and allotted. That from time whereof the memory of man is not to the contrary, up to the time of the passing of the said Act, the Lord Bishop of *Durham* for the time being and his assigns had been used and accustomed [as of right (a)] to search for, win and work the said coal mines so lying and being in and under the said commons, moors and waste lands without let or interruption, and without leaving any support for the said lands in and under which the said mines were so situate as aforesaid, and without making or paying any satisfaction for any injury that might be caused by such working of the said mines; and that from the time of passing the said Act hitherto the said mines have been so worked without leaving any support for the said lands. That the said mines in the declaration mentioned were, at the time of the passing of the said Act and of the committing of the said alleged grievances, parcel of the said mines in the said Act mentioned, and that the defendants at the time of committing the said grievances in the declaration mentioned were and are possessed of and interested in, and entitled to work and did work, the said mines under and by virtue of a certain lease thereof, bearing date on or about the 28th *February*, 1851, and made between the Lord Bishop of *Durham* of the one part, and one *John Fenwick* of the other part.

Fourth plea, as to working the said mines without leaving proper and sufficient support in that behalf: that the said land in the declaration mentioned is situate

(a) These words were inserted during the argument, by amendment, on the application of the Attorney General, for the defendants.

in the township of *Lynesack* and *Softley*, in the county of *Durham*, which said township has been, from time whereof the memory of man is not to the contrary, within and part and parcel of the manor of *Wolsingham*, in the said county, and of which said manor, from time whereof, &c., the Lord Bishop of *Durham* for the time being, in right of his church and see of *Durham*, has been lord, and, as such lord, seised in his demesne as of fee of and in certain mines and collieries situate and lying within the said manor: and that for the period of forty years next before the commencement of this suit the said lord of the said manor, and his tenants and farmers, occupiers of the said mines and collieries, have been used and accustomed of right, and without interruption, to work the said mines and collieries within the said manor, without leaving any support for the said lands in the said manor in and under which the said mines and collieries were situate: that at the time of the said alleged grievances, the defendants were tenants to the lord of the said manor of the mines in the declaration mentioned, the same being part of the mines and collieries hereinbefore mentioned as being within the said manor, and that the said working the said mines under the said land of the plaintiff without leaving any support for the said land, as in the declaration alleged, was a working by them of the said mines in the exercise of and according to the said right and custom.

Fifth plea, as to working the said mines without leaving any proper or sufficient support in that behalf: the defendants crave leave, for brevity's sake, to repeat the allegations in the last plea, substituting the period of twenty years for the period of forty years in the last plea mentioned.

1862.

BLACKETT

V.

BRADLEY.

1862.
 BLACKETT
 V.
 BRADLEY.

Demurrer to the 3d, 4th and 5th pleas.

Joinder in demurrers.

The demurrers were argued in *Michaelmas Term* (Nov. 8, 12, 1861), before *Cockburn C. J.*, *Wightman* and *Blackburn JJ.*

Manisty (*T. Jones*, of the Northern Circuit, with him), for the plaintiff.—First. The third plea, which contains no averment of a custom to work the mines under the commons without leaving any support, and without making compensation for injury caused by such working, is no answer to the action. By the Enclosure Act the lord of the manor came to an agreement with the freehold or customary owners of land, who had rights of common over the wastes of the manor, that the wastes should be divided between himself and the commoners, and that he should retain all his right of working the minerals. If the Enclosure Act had not passed he could have had no right to work the mines so as to create a nuisance on the surface, by which the cattle of the commoners should fall into holes and be injured. Admitting that, before the act of inclosure, there might be a custom to work the mines so as to do some injury to the surface, the custom must be confined within reasonable limits so as to protect the rights of the commoners. An agreement between the lord of the manor and the commoners, by which the lord should have liberty to work the mines so as to endanger the lives of the cattle of the commoners, is not to be presumed. The dictum in the judgment in *Hilton v. Earl Granville* (a), that “even if the grant could be produced in specie, reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repug-

(a) 5 Q. B. 701. 730.

nant and absurd," has been overruled in *Rowbotham v. Wilson* (a). But the decision in *Hilton v. Earl Granville*, that a prescription or a custom to that effect was bad as being unreasonable, was not questioned; and the authorities are consistent with this proposition, that a custom so highly detrimental to the subject-matter of the grant as that in question is will not be presumed; *Broadbent v. Wilks* (b), per *Willes C. J.*, *Badger v. Ford* (c). This has none of the requisites to the validity of a custom; *Tyson v. Smith, in error* (d), per *Tindal C. J.*, *Broom's Legal Maxims*, 824, 825, 3d ed. It is neither certain nor reasonable; it is claimed in all parts of the manor, and without limit as to the extent to which the surface may be damaged. [He cited *Y. B. 2 H. 4. 24*, pl. 20, which is followed in 1 *Bl. Comm.* 77, from *Co. Copyhold*, s. 33, p. 71; 4th resolution in *Heydon and Smith's Case* (e), *Wilson v. Willes* (f), per Lord *Ellenborough*, *Arlett v. Ellis* (g), *Clayton v. Corby* (h).] It is stated in the judgment in *Smart v. Morton* (i) that, according to the course and practice of mining in the county of *Durham* till the year 1810, ribs of coal were left to support the surface. Further, the plea does not state a custom justifying the letting down of the surface. [*Blackburn J.* It is a necessary consequence that the surface should come down if no support is left.]

Secondly, according to the grammatical and reasonable construction of the Enclosure Act, 1758, which recites that the land owners entitled to right of common over

1862.

 BLACKETT
 V.
 BRADLEY.

(a) 6 *E. & B.* 593; affirmed in *Exch. Ch.* 8 *E. & B.* 123; and in *D. P.* 8 *H. L.* 348.

(b) *Willes*, 360. 363; affirmed on error, 2 *Str.* 1224.

(c) 3 *B. & A.* 153:

(d) 9 *A. & E.* 406. 421.

(e) 13 *Rep.* 67, 68.

(f) 7 *East*, 121. 128.

(g) 7 *B. & C.* 346.

(h) 5 *Q. B.* 415.

(i) 5 *E. & B.* 30. 48.

1862.

BLACKETT
v.
BRADLEY.

the wastes were desirous to improve their estates and properties "and that the said commons or waste ground might be cultivated and improved and rendered of some use and value," it gives a right of ownership in the surface to the allottees, so that any person taking under that Act would suppose that he might erect buildings upon it. The right reserved to the lord of "winning and working the said mines" may be referred to works on the surface. [*Blackburn J.* This right is different from the "liberty of laying and repairing waggon ways and other ways," which is reserved separately.] The next clause, which provides for compensation to persons for damage done in their respective allotments by the exercise of the right by the lord of working the mines to be borne by the occupiers of the allotments in the same township, supposes that the mines would be worked so that the surface of all the allotments should be supported; but that when the surface is injured by working in an adjoining allotment, compensation shall be given. According to the construction contended for by the defendants, though the compensation clause was introduced to give compensation for damage arising from the exercise of any of the rights reserved to the lord, it gives none for damage done by working under adjoining land. The right of the owners, which before the Act was a right of common, is by the Act converted into a right to cultivate and improve the land. This Act is, in many respects, like that in *Roberts v. Haines* (a): and the Court will construe it so as to preserve both tenements; *Midgley v. Richardson* (b), *Humphries v. Brogden* (c), *Smart v. Morton* (d). In

(a) 6 E. & B. 643; affirmed on error, 7 E. & B. 625.

(b) 14 M. & W. 595.

(c) 12 Q. B. 739.

(d) 5 E. & B. 30.

Rowbotham v. Wilson (a) there was an express power to destroy the surface.

1862.

BLACKETT
v.
BRADLEY.

As to the 4th and 5th pleas, which set up respectively a custom for twenty and forty years. Besides the badness of the custom, it was not intended by Lord *Tenterden's* Act, 2 & 3 *W. 4. c. 71.*, to give to the lord of the manor, or any other person, who by working under the neighbouring land acquires a right against the owner of it, a right also against another land owner. These pleas rely on a custom to work the mines "within the manor," not within the locus in quo.

The *Attorney General*, for the defendants.—The prescription stated in the third plea is good: the exercise of the right claimed by it for the lord of the manor is not destructive of the grant to the commoners, though it may impair it. If an express compact, in the same terms, had been entered into between the lord and the commoners, a Court of law would have given it effect. In the instances cited of the badness of customs, the Courts would not have enforced a grant which contained a clause reserving the right claimed by the custom. In *Bateson v. Green* (b), a custom for the lord to dig clay pits, though there was not sufficient herbage for the commoners, was supported; and *Buller J.* said, p. 416, "In general, one would say, that the lord's is the superior right, because the property of the soil is in him." [*Wightman J.* That case is commented upon by *Bayley J.* in *Arlett v. Ellis* (c).] *Harris v. Ryding* (d) and

(a) 6 *E. & B.* 593; affirmed in *Exch. Ch.* 8 *E. & B.* 123; and in *D. P.* 8 *H. L.* 348.

(b) 5 *T. R.* 411.

(c) 7 *B. & C.* 346, 365, 373.

(d) 5 *M. & W.* 60.

1862.
 BLACKETT
 V.
 BRADLEY.

Smart v. Morton (a) were decided upon the construction of clauses in a deed, and *Roberts v. Haines* (b) on the construction of an Enclosure Act. As to *Hilton v. Earl Granville* (c), it is so far distinguishable from this case that there, previous to the enclosure, the locus in quo was part of the old enclosures of the manor; here the locus in quo could not have been built upon: but the cases decided since are at variance with that case. In *Humphries v. Brogden* (d) it was not contended that, if the deed bore the construction contended for by the defendants, who were lessees of the Bishop of *Durham*, it would be valid in law.

When *Rowbotham v. Wilson* (e) was before the Exchequer Chamber the Judges differed in opinion, and the judgment was only affirmed by a majority. [*Blackburn J.* I do not know that they differed on this point.] The judgment of the House of Lords in that case proceeds solely on the question of surface damage. [*Blackburn J.* The Court understood the claim to be to work without leaving support. *Cockburn C. J.* The judgment in *Hilton v. Earl Granville* (c), p. 726, refers to the cases on the validity of customs, and mainly proceeded on the ground that such a custom as there pleaded was unreasonable. *Wightman J.* That judgment may be supported on the ground that, by the custom, the mine must have been intended to be worked as mines were generally worked, that is in a reasonable manner.] The decision in *Harris v. Ryding* (f) proceeded on a ground which would have supported *Hilton v. Earl Granville* (c). [*Black-*

(a) 5 E. & B. 30.

(b) 6 E. & B. 643.

(c) 5 Q. B. 701.

(d) 12 Q. B. 739.

(e) 6 E. & B. 593; affirmed in Exch. Ch. 8 E. & B. 123; and in D. P. 8 H. L. 348.

(f) 5 M. & W. 60.

burn J. It may be that though the parties may legally have made such a compact it would not be reasonable to presume that they had done so. *Cockburn C. J.* Where a reservation in a grant is rejected by the Court, it is rejected, not because it is unreasonable, but because it is inconsistent with the grant.] In *The Marquis of Salisbury v. Gladstone, in error (a)*, a custom in a manor that the copyholders of inheritance might, without licence from the lord, break the surface and dig and get clay without limit from their copyhold tenements for the purpose of making bricks to be sold by them off the manor, was held good in law. The Enclosure Act does not lessen the rights which the lord had : and it reserves those rights, though it may be that it could not have created them. The section which provides for compensation shews that it is to be for damage in working the minerals, and not for damage in the superficial working.

As to the 4th and 5th pleas, assuming that the prescription, as averred in the 3d plea, is good, the only question is whether those pleas are good under stat. 2 & 3 W. 4. c. 71., for shortening the period of prescription. The words "of another" are not in the second section. [*Cockburn C. J.* The custom is pleaded in alieno solo : the party against whom it is set up could only resist the working when in his soil. It is very clear that Lord *Tenterden's* Act does not apply except to the case of working in the land of a person who was in a position to resist it and submitted to it. *Wightman J.* If the custom is bad it cannot be better when pleaded under Lord *Tenterden's* Act.] The pleas in substance allege that the lord exercised his right under the locus in quo, —the custom set up is to work all the mines within the

1862.

BLACKETT

V.
BRADLEY.

(a) 6 H. & N. 123, affirmed in D. P. 8 Jur. N. S. 625.

1862.

BLACKETT

v.

BRADLEY.

manor, whereas the locus in quo is the surface over part of it. [*Blackburn J.* The custom is not pleaded to work in that particular part of the manor in which the plaintiff owns the surface.] Is it not included? [*Wightman J.* That should be averred with certainty in order to bring the case within the Act.]

Manisty, in reply.

Cur. adv. vult.

COCKBURN C. J. (*Jan.* 30th) delivered the judgment of the Court.

In this case, which was argued before my brothers *Wightman* and *Blackburn* and myself, on the argument on the demurrer to the plea it was admitted that, if *Hilton v. Lord Granville* (a) was to be considered as law, the present case was within the decision in that case, and, so far as this Court was concerned, must be governed by it. But it was insisted, on the part of the defendants, that the case of *Hilton v. Lord Granville* had been so much impugned and shaken by subsequent cases that it must be considered as virtually overruled; at all events sufficiently so to call upon the Court to review the decision in that case, and, upon the arguments urged against its validity, now to overrule it.

There can be no doubt that to some extent the authority of *Hilton v. Lord Granville* (a) has been shaken, inasmuch as a position assumed in the reasoning of the Court as one of the grounds of its decision has since been distinctly overruled in the House of Lords in the case of *Rowbotham v. Wilson* (b), in which the question presented itself for adjudication. And it cannot be denied

(a) 5 Q. B. 701.

(b) 8 H. L. 348.

that the decision itself has not met with the universal approval of the profession ; and that it may be desirable that the validity of that decision should be brought under the consideration of a Court of error. At the same time it is equally clear that, though the reasoning of this Court in *Hilton v. Lord Granville* (a) has been impugned, the decision in that case has not been overruled. And, the judgment having been a considered judgment of the Court, and standing unreversed, we do not feel ourselves at liberty to consider ourselves as otherwise than bound by it. We must therefore, but without expressing any opinion one way or the other as to the propriety of the decision in question, give judgment on the 3d plea for the plaintiff, leaving the defendants to take the case into error if they shall be so advised.

The question arising on the 4th and 5th pleas was disposed of during the argument. We then intimated our opinion that those pleas were bad, inasmuch as they did not shew any acts done on the plaintiff's land ; and acts done on the land of another, though done as of right for twenty or forty years, could not in our judgment affect the plaintiff's right. On these pleas also, therefore, there will be judgment for the plaintiff.

Judgment for the plaintiff.

(a) 5 Q. B. 701.

1862.

BLACKETT
v.
BRADLEY.

1862.

BLACKETT
v.
BRADLEY.

the said moors or commons or otherwise in or upon the said commons so to be enclosed), in as full and beneficial a manner to all intents and purposes as they or any of them could or might have held and enjoyed the same in case the said Act had not been made; and also that the said Lord Bishop of *Durham*, his successors and assigns, should and might at all times thereafter have, hold and enjoy all mines and quarries, of what nature or kind soever, lying and being in and under the said moors and commons so to be allotted and divided as aforesaid (other than and except certain quarries of stone), together with all convenient and necessary ways and way-leaves, and liberty of laying and repairing waggon ways and other ways, in, over and along the same or any part thereof, and of searching for, winning and working the said mines and quarries, and leading and carrying away the coals, lead, minerals, stones and other things to be gotten thereout, and making drifts, levels, water-courses, erecting and using fire engines and other engines, pit-rooms and other usual liberties, as fully and freely as he or they might or could have had or enjoyed the same in case the Act had not been passed, and that without making or paying any satisfaction for so doing. And after reciting that great inconveniences might happen and damage be done to particular persons by reason of the searching for, winning and working the mines and quarries within and under their respective allotments by the said Lord Bishop of *Durham*, his successors and assigns, without making or paying any satisfaction for so doing, it was by the said Act further enacted that when and so often as any person or persons should suffer or sustain any loss or damage in his or their respective allotments by

the searching for, winning and working of the mines and quarries therein, or the laying and repairing waggon ways or other ways, or by the leading and carrying away the coals, lead, minerals, stones or other things to be gotten thereout, or making drifts, levels or water-courses, or erecting or using fire-engines or other engines, pit-room or other the liberties and powers thereby given and reserved to the said Lord Bishop of *Durham*, his successors and assigns, upon complaint thereof made by such person or persons so damnified as aforesaid, to one or more justice or justices of the peace in and for the county of *Durham*, such justice or justices was and were thereby empowered and required to examine and inquire into such complaint or complaints in a summary way, and finally to settle and assess the damages sustained by such person or persons as aforesaid, which damages should be paid and borne by the occupiers of the several said allotments, lying and being in such and the same township in which the allotment or allotments in which such damages should be committed should be, according to the respective yearly values or rents of such allotments, in such proportion as such justice or justices should direct or appoint, and within such times as should be limited by the said justice or justices, with power to the said justice or justices to issue their warrant, under their or his hand and seal, for levying such proportion by distress and sale, in case the same should not be paid by the person or persons so liable to pay the same. That the said commons, moors or waste lands were, after the passing of the said Act, and before the 1st *November*, 1760, duly allotted, divided and enclosed, in pursuance of and according to the provisions of the said Act, and an award in pursuance of the said

1862.

 BLACKETT
 V.
 BRADLEY.

1862.

BLACKETT
v.
BRADLEY.

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1862.

 BLACKETT
 v.
 BRADLEY.

1862.
BLACKETT
v.
BRADLEY.

Act duly made by the said Commissioners, and that the land in the declaration mentioned was and is parcel of the said moors, commons and waste lands so enclosed and allotted. That from time whereof the memory of man is not to the contrary, up to the time of the passing of the said Act, the Lord Bishop of *Durham* for the time being and his assigns had been used and accustomed [as of right (a)] to search for, win and work the said coal mines so lying and being in and under the said commons, moors and waste lands without let or interruption, and without leaving any support for the said lands in and under which the said mines were so situate as aforesaid, and without making or paying any satisfaction for any injury that might be caused by such working of the said mines; and that from the time of passing the said Act hitherto the said mines have been so worked without leaving any support for the said lands. That the said mines in the declaration mentioned were, at the time of the passing of the said Act and of the committing of the said alleged grievances, parcel of the said mines in the said Act mentioned, and that the defendants at the time of committing the said grievances in the declaration mentioned were and are possessed of and interested in, and entitled to work and did work, the said mines under and by virtue of a certain lease thereof, bearing date on or about the 28th *February*, 1851, and made between the Lord Bishop of *Durham* of the one part, and one *John Fenwick* of the other part.

Fourth plea, as to working the said mines without leaving proper and sufficient support in that behalf: that the said land in the declaration mentioned is situate

(a) These words were inserted during the argument, by amendment, on the application of the Attorney General, for the defendants.

in the township of *Lynesack* and *Softtey*, in the county of *Durham*, which said township has been, from time whereof the memory of man is not to the contrary, within and part and parcel of the manor of *Wolsingham*, in the said county, and of which said manor, from time whereof, &c., the Lord Bishop of *Durham* for the time being, in right of his church and see of *Durham*, has been lord, and, as such lord, seised in his demesne as of fee of and in certain mines and collieries situate and lying within the said manor: and that for the period of forty years next before the commencement of this suit the said lord of the said manor, and his tenants and farmers, occupiers of the said mines and collieries, have been used and accustomed of right, and without interruption, to work the said mines and collieries within the said manor, without leaving any support for the said lands in the said manor in and under which the said mines and collieries were situate: that at the time of the said alleged grievances, the defendants were tenants to the lord of the said manor of the mines in the declaration mentioned, the same being part of the mines and collieries hereinbefore mentioned as being within the said manor, and that the said working the said mines under the said land of the plaintiff without leaving any support for the said land, as in the declaration alleged, was a working by them of the said mines in the exercise of and according to the said right and custom.

Fifth plea, as to working the said mines without leaving any proper or sufficient support in that behalf: the defendants crave leave, for brevity's sake, to repeat the allegations in the last plea, substituting the period of twenty years for the period of forty years in the last plea mentioned.

1862.

 BLACKETT
 v.
 BRADLEY.

the defendant, as proprietor of the bridge, the duty to repair and maintain it as long as he received the tolls. *Nicholl and others v. Allen*, 916.

BRISTOL AND EXETER RAILWAY COMPANY.

I. *The Bristol and Exeter Railway Company* was incorporated by stat. 6 & 7 W. 4. c. xxxvi., by which it was enacted (inter alia), sect. 174, that all persons should have free access to use the railway with carriages constructed as directed by the Act. Sect. 175, that the Company might charge a tonnage of so much per mile upon all things conveyed along the railway. Sect. 177, that the Company might provide locomotive engines or other power for drawing things upon the railway, and receive such sums for the use of them as they should think proper, in addition to the other sums authorized to be taken. Sect. 178, that they might use locomotive engines or other power, and, in carriages or waggons propelled thereby, convey things along the railway, and make such reasonable charges for conveyance as they might determine upon, in addition to the rates or tolls authorized to be taken. By sect. 183 they were likewise authorized to fix the sum to be charged for small parcels not exceeding 500 lbs weight each. Sect. 184 enacted that where things or persons were conveyed for a less distance than six miles, the Company might demand and receive the aforementioned "rates, tolls and charges for conveyance" for six miles; and sects. 185, 186 and 187 contained certain other provisions relative to "rates and tolls only." By sect. 188, they were directed to affix on boards upon their toll houses &c., a list of the rates and tolls directed by them to be taken. By stat. 8 & 9 Vict. c. clv. s. 2. the powers of former Acts regulating the Company are extended to that Act, except such as expired by effluxion of time, or are inapplicable to it, or inconsistent with or provided for by The Lands Clauses Consolidation Act, or with such of the provi-

sions of The Railways Clauses Consolidation Act as were made applicable to that Act. Sect. 18 fixed the sum which the Company might charge for passengers; and sect. 19 gave a scale of so much per ton per mile, in respect of articles conveyed on the railway. *A. B.* delivered goods to the Company to be carried. These were of different kinds, and were made up in packages, some of which exceeded, and others of which did not exceed 500 lbs. weight each. The charges made by the Company and paid by *A. B.* for the carriage of the goods on the railway amounted to sums which, (after deducting reasonable sums for the expenses of loading and unloading), exceeded the maximum sums authorized to be charged for the carriage of the several kinds of goods respectively by stat. 8 & 9 Vict. c. clv. s. 19.: Held that *A. B.* was entitled, under a count for money had and received, to recover back the sums paid by him in excess of the sums authorized to be charged for carriage of goods by 8 & 9 Vict. c. clv. upon such of those packages of goods as exceeded 500 lbs. in weight, but not upon the rest.

II. The above Company published a scale of charges at which parcels would be carried along their line, including collection and delivery within certain limits, if delivered by the Company's appointed agents. *A. B.*, a carrier, in the course of his business as such, forwarded from *Bristol*, by passenger and van trains on the railway, parcels of goods which were consigned to his agents residing at various towns and places on the line of the railway for delivery by such agents. On all such occasions the parcels in question were collected by *A. B.* from his customers in *Bristol*, and were taken by him with his own horses, carts and servants to the railway station there, from whence they were forwarded to some other station on the railway. On other occasions the agents of *A. B.* residing at *Exeter* and other places on the line of the railway, forwarded thence by passenger and van trains to *A. B.* at *Bristol* parcels of goods for delivery in *Bristol*. On all such last mentioned

occasions the parcels were received by *A. B.* at the railway station at *Bristol* and from thence delivered by him, in his own carts and vans, to the parties in *Bristol* to whom they were directed. The sums paid by *A. B.* to the Company for the carriage on the railway of all the above mentioned parcels which were so respectively forwarded and received by *A. B.* included, in accordance with the rates fixed by the said scale bills, charges for collection and delivery in *Bristol*, though such services were not in fact performed by the Company for *A. B.*: Held that these sums were improperly charged, and might be recovered back under a count for money had and received.

III. The above Company charged *A. B.* certain sums, reasonable in themselves, for carrying his goods along their line, while they carried the like goods for other parties at lower rates: Held that *A. B.* was not entitled, in an action for money had and received, to recover from the Company the excess of the sums paid by him above those paid by the other parties.

IV. In the case of the same Company, whenever any of the public (not being carriers) brought and delivered at one time a number of separate parcels or packages to the Company to be carried, if they all contained goods of the same kind or description (such as drugs or drapery), and were addressed to the same party, the Company were in the habit of charging them in the aggregate according to the parcels rates where the aggregate weight did not exceed 500 lbs., and according to the lower or tonnage rates where the aggregate weight exceeded 500 lbs. Whereas if *A. B.* brought a number of separate parcels or packages of the same kind to the Company to be carried, which (though addressed also to the different ultimate consignees for whom they were intended) bore a separate address to *A. B.*, and at the end of the journey were received by him or his agents from the Company, the Company charged *A. B.* for each parcel or package separately. If (as occasion-

ally happened), amongst a number of separate packages so brought by *A. B.* to the Company to be carried, two or more of the same kind were found to be addressed to the same ultimate consignee, the Company aggregated those which were so addressed to the same ultimate consignee, but refused to aggregate the others: Held, that the Company were justified in so charging.

V. In the case of the same Company it appeared that, on various occasions since the publication of the scale bills, *A. B.* brought and delivered goods to the Company to be conveyed, for the conveyance of which goods the Company demanded, and *A. B.* paid, sums exceeding the rates specified in the scale bills. These sums were, in some instances, demanded by the Company's servants through mistake; in other instances the demand was made intentionally: Concessum, that this claim of the Company could not be supported.

VI. *Semble*, that, in order to entitle the above Company to make any of the above charges, they were not bound to affix to their toll-houses &c. boards indicating the amount of their rates and tolls; but Held that, if they even were, their having neglected to do so did not entitle *A. B.* to recover back as money had and received, any of the above payments made by him. *Garton and another v. The Bristol and Exeter Railway Company*, 112.

BROKER.

The defendants, merchants and shipbrokers at *Bristol*, who had before acted as agents for the plaintiffs, merchants at *Liverpool*, in shipping iron, offered to them some "good old scrap iron" belonging to *O.* (for whom they were also acting as brokers, specifying the descriptive quality and price of the iron. The plaintiffs asked for an offer of cost and freight from *Bristol* to *Rotterdam*, and a further description of the iron. The defendants wrote and gave the description;

and afterwards wrote naming a ship, and the rate of freight. The plaintiffs agreed to purchase the iron at the price proposed, but objected to the ship; and the iron was subsequently shipped at *Bristol* on board another ship, chartered by the defendants on behalf of plaintiffs. The sold note for the iron, sent by the defendants, was signed by O., and stated the iron to be "sold" to the defendants "for their principals," and to be "weighed and delivered alongside a vessel or vessels." The defendants received no remuneration from the plaintiffs, but received commission from O. and from the owners of the ship. The iron afterwards turned out to be of a much inferior quality to that agreed upon. In an action by the plaintiffs against the defendants for negligence in accepting and shipping at *Bristol*, and paying O. for, iron of that inferior quality: Held by the Court of Queen's Bench, that the defendants were not liable: that they acted in the transaction in two capacities, viz., as brokers between the plaintiffs and O., in negotiating the sale of the iron; and, subsequently, as agents for plaintiffs in receiving and forwarding the iron: that the two retainers were distinct; and that, as shipping agents under the latter, the defendants were not bound, and had no authority, in the absence of any usage to that effect, to accept or reject, on behalf of the plaintiffs, on its arrival at *Bristol*, the iron of which they had previously, as brokers only, negotiated the purchase, and this judgment was affirmed in the Exchequer Chamber. *Zwischenbart and others v. Alexander and others*, 234.

BURIAL GROUND.

Stat. 18 & 19 Vict. c. 128. s. 18., which enacts that, in every case in which any order in council is issued for the discontinuance of burials in any churchyard or burial ground, the Burial Board or Churchwardens shall maintain such churchyard or burial ground of any parish in decent order, and also do the necessary repair of

CALLS.

the walls and other fences thereof, and the expences shall be repaid by the overseers, upon the certificate of the Burial Board or Churchwardens, out of the poor rate of the parish or place in which such churchyard or burial ground is situate, unless there shall be some other fund legally chargeable with such expences, does not apply to a burial ground which is not a burial ground of any parish, but is the property of private persons. *The Queen v. The Burial Board for the Parishes of St. John, &c., Newcastle upon Tyne*, 679.

CALLS.

See *Company*.

CARRIER.

See *Common Carrier*.

CASE FOR OPINION OF SUPERIOR COURT.

See *Quarter Sessions, Case reserved by*.

CERTIFICATE.

Of justice of the peace.

Where, under 9 G. 4. c. 31. ss. 27—29., a complaint of assault or battery has been made to two justices of the peace, who dismiss the complaint and give the party a certificate accordingly, the certificate may be pleaded in bar to an indictment, founded on the same facts, charging assault and battery, accompanied by malicious cutting and wounding so as to cause grievous or actual bodily harm. *The Queen, on the prosecution of Finney, v. Eltrington and another*, 688.

Of registry. See *Merchant Shipping Act*.

CHARITABLE PURPOSES.

The Society of Licensed Victuallers, founded for the purpose of relieving distressed members from its funds, was incorporated by Royal charter. The Society maintained a school for the education, free of charge, of the children of decayed or deceased licensed victuallers; and possessed a school house and other premises, used for that purpose. The charter provided that the management of the Society should be entrusted to a Governor and Committee: and that the members of the Society should meet quarterly, and should have power, at such meetings, to make by-laws. One of these by-laws, so made, provided that these quarterly meetings should be held in the premises of the Society's school, or at such other place as the Governor and Committee might appoint. These meetings were accordingly held on the premises. On appeal by the Society against a poor rate, a general rate for defraying the expences of The Metropolis Local Management Act, and a sewers rate for defraying the expences of the main drainage, assessed upon them in respect of the premises in question: Held, that the Society had a beneficial occupation of the premises, and were rateable in respect of them. *The Queen v. The Governors, &c., of The Licensed Victuallers' Society*, 71.

CHURCH RATE.

I. Declaration against justices of the peace alleged that the plaintiff was rated to a church rate, which was demanded on the 8th September, 1857: that the plaintiff was summoned for non payment thereof on the 5th May, 1859; that at the hearing, on the 12th May, 1859, the plaintiff gave evidence that the rate had been demanded of him and the matter of complaint had arisen more than six months before the complaint, and contended that, by stat. 11 & 12 Vict. c. 43. s. 11., the defendants had no jurisdiction: yet the defendants made

VOL. I.

3 T

an order for payment of the rate, which order had been quashed. Plea, that upon the hearing of the complaint it was proved that, besides the demand of the rate in the declaration mentioned, the same was again demanded on the 25th March 1859, and the complaint was laid within six calendar months from the time of that demand. Upon demurrer, held, that it was within the duty of the defendants, as justices, to determine the question whether a complaint was made within the time limited; and therefore, by sect. 1 of stat. 11 & 12 Vict. c. 44., the action was not maintainable without proof of malice and want of reasonable and probable cause. *Somerville v. Mirehouse and another*, 652.

II. Declaration against justices of the peace alleged that the plaintiffs were rated to a church rate, the validity of which rate was disputed by them; that they were summoned for non payment of the rate; that at the hearing before the defendants the plaintiffs, in good faith disputing the validity of the rate, gave the defendants notice thereof: yet the defendants, not acting bonâ fide in the belief that they were acting in conformity to law, and when they well knew that they had not jurisdiction to proceed, made an order for payment of the rate, which order was afterwards quashed, and issued their warrant of distress, by virtue of which the goods of the plaintiffs were distrained. Plea, as to the distraining of the goods of the plaintiffs; that the warrant was issued on the application of the churchwardens, and executed by their direction as well as by the command of the defendants; and that the plaintiffs afterwards recovered judgment in replevin against the churchwardens. Upon demurrer, held,

1. That the allegations in the declaration sufficiently shewed that the defendants knew that the validity of the rate was bonâ fide disputed, and that proper notice thereof was given to them; and therefore, by the proviso to sect. 7 of stat. 53 G. 3. c. 127., they acted without jurisdiction in making the order and warrant.

B. & S.

3. The action was, therefore, by sect. 2 of stat. 11 & 12 Vict. c. 44, maintainable without proof of malice and want of reasonable and probable cause.

4. *See*, per *Eschborn J.* If the defendants acted erroneously under the belief that the validity of the rate was not bona fide disputed, the action would be within sect. 1 of stat. 11 & 12 Vict. c. 44.

4. The proviso in sect. 7 of stat. 53 G. 3. c. 127, which takes away the jurisdiction of justices where the validity of the rate is bona fide disputed, extends to *Quakers, Pennes and others v. Chapter and another*, 658.

CLAIM.

See Land Claims Consolidation Act.

CLEEKSHIP, ARTICLES OF.

See Articles of Clerkship.

COLONY, LAW OF.

See Insult, IV.

COMMON CARRIER.

1. A railway Company, carrying on business as common carriers for hire, refused to receive certain goods tendered to them for carriage as such, unless the sender of the goods would sign a condition by which the Company were not answerable "for the loss, detention or damage of any package insufficiently or improperly packed, marked, directed or described": Held, an unjust and unreasonable condition, both at common law and under the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31. *Gorton and another v. The Bristol and Exeter Railway Company*, 112.

2. *See*, per *Cockburn, C. J.*, that a condition imposed by a railway Company carrying on business as common carriers for hire, that "no claim for damage will be allowed unless made within three days after the delivery of the goods, nor for loss unless made within three days of

COMMON MEMORANDUM.

the time that they should be delivered," is unjust and unreasonable. *Id.*

3. A railway Company, carrying on business as common carriers for hire, refused to receive the goods of *A. B.* on the ground that they were tendered after a quarter past five in the evening, although they did receive the goods of *C. D.* at a later hour: Held, that, in the absence of explanation, this was unlawful conduct in the Company, and *A. B.* having sustained damage in consequence of it, was entitled to recover against them. *Id.*

4. A declaration alleged that a railway Company, carrying on business as common carriers for hire, refused to carry certain goods unless the sender of the goods would sign certain "unjust and unreasonable conditions": Held, that, this allegation was satisfied by proof that one of the conditions thus required to be signed was unjust and unreasonable. *Id.*

COMMON MEMORANDUM.

Five per cent. clause in.

See Marine Insurance, II. 3.

COMPANY.

The declaration stated that the defendant was the holder of fifty shares in the plaintiffs' Company, and indebted in respect of seven calls, whereby an action had accrued to the plaintiffs against him under and by virtue of their deed of settlement. Pleas. 1. Never indebted. 2. That the defendant was not the holder of the shares. 3. That the deed was not his deed. Replication to the third plea, setting out the charter of incorporation, whereby Her Majesty willed that the capital should be 120,000*l.* divided into 6000 shares: that all the proprietors of the stock of the corporation should execute a deed of settlement whereby the capital should be divided into those shares, to be numbered in regular succession, beginning with 1, and whereby they should enter

into covenants for payment of the sums subscribed by them when called for: that such a deed was executed (various clauses were set forth), and that the defendant was a shareholder and had paid certain calls. Before the charter was granted the brokers to the Company had put down the name of the defendant, without his authority, as an applicant for shares, and the promoters allotted to him fifty shares, and sent an allotment letter informing him thereof, and requiring a deposit of 1*l.* per share, adding, "and on your execution of the deed prepared in conformity with the provisions of the Royal charter, you will be entitled to fifty share certificates of the Company." The defendant paid the deposit of 1*l.* a share. The charter was afterwards granted, and the deed prepared and executed by many shareholders, but not by the defendant. In the deed were the following clauses, which were substantially the same as those contained in The Companies Clauses Consolidation Act, 1845, 8 & 9 *Vict. c. 16.*:—3. The shares shall be numbered in regular succession, beginning with 1; and every share shall be distinguished by its separate number.—5. Every person who shall have subscribed the prescribed sum to the capital, or shall otherwise have become entitled to a share of the same, and whose name shall have been entered on the register of shareholders, shall be deemed a shareholder.—6. The corporation shall keep a book to be called "The Register of Shareholders," in which shall be entered the names of the persons entitled to shares, together with the number of shares to which such persons are entitled, distinguishing each share by its number, and the amount of instalments paid on such share.—8. A certificate of ownership, under the corporation seal, shall be delivered to each shareholder; and such certificate shall specify the share in the undertaking to which such shareholder is entitled.—65. In an action for calls, it shall be sufficient to declare that the defendant is owner of one share or more "(stating the number of shares)," and is indebted in respect of one call

or more, whereby an action hath accrued to the corporation by virtue of the deed.—66. On the trial it shall be sufficient to prove that the defendant, at the time of the call, was a holder of one share or more.—It was represented by the prospectus issued shortly before the date of the charter, and by the letter of allotment, that no more than three calls should be made until the Company's works should be in operation. The defendant had paid four calls, but refused to pay the calls in question.

1. Held by the Court of Queen's Bench, and affirmed by the Exchequer Chamber, that shares were not created so as to make the alleged owner liable to calls.

2. Held, by the Exchequer Chamber, that the defendant was not a shareholder, as he had not executed the deed of settlement.

3. *Semble*, that after acceptance of the shares and payment of the calls, especially the call made after those specified in the prospectus and letter of allotment, and the correspondence in which he was treated as a holder of shares, and as he knew of the existence of the charter and the deed, the defendant could not say, as against the other shareholders and the Company, that he was not a shareholder by reason of the stipulations in the prospectus and letter of allotment not having been carried out. *The Irish Peat Company v. Phillips*, 598.

Incorporated Joint Stock (limited).

By stat. 19 & 20 *Vict. c. 108. s. 39.*, in certain cases, if a defendant objects to the action being tried in the County Court, and gives security to be approved of by the registrar, the action shall be stayed; and by sect. 70 "such security shall be at the cost of the party giving it, and in the form of a bond, with sureties to the other party;" and in the form given in the Schedule of Forms to the Rules of Practice of the County Courts, the bond purports to be executed by the party and two sureties: Held, that where the defendants were an incorporated joint stock Company, limited, it was within

limited to the justice before whom the first application is made; and that the second summons, not being issued by the same justice, could not be considered as part of the original process upon the first application. *The Queen v. Pickford*, 77.

BENEFICIAL OCCUPATION.

The Society of Licensed Victuallers, founded for the purpose of relieving distressed members from its funds, was incorporated by Royal charter. The Society maintained a school for the education, free of charge, of the children of decayed or deceased licensed victuallers; and possessed a school house and other premises, used for that purpose. The charter provided that the management of the Society should be entrusted to a Governor and Committee: and that the members of the Society should meet quarterly, and should have power, at such meetings, to make by-laws. One of these by-laws, so made, provided that these quarterly meetings should be held in the premises of the Society's school, or at such other place as the Governor and Committee might appoint. These meetings were accordingly held on the premises. On appeal by the Society against a poor rate, a general rate for defraying the expenses of The Metropolis Local Management Act, and a sewers rate for defraying the expences of the main drainage, assessed upon them. in respect of the premises in question: Held, that the Society had a beneficial occupation of the premises, and were rateable in respect of them. *The Queen v. The Governor and Committee of The Licensed Victuallers' Society*, 71.

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See *Insolvent*, I.—IV.

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Stat. 15 & 16 Vict. c. 81. ss. 32-34 and 35., which provides for the collection of the county rate in parishes situate partly within boroughs and partly without, applies only to boroughs "not subject to contribute to the county rate;" and therefore, where a parish is situate partly within a borough which contributes to the county rate, a separate rate towards the expence of the county police cannot be made upon the part without the borough, though the part within it is governed by a local Act, under which police constables are appointed and paid. *The Queen v. The Overseers of Huddersfield*, 961.

BRIBERY.

I. On the trial of an information for bribery, filed by *The Attorney General* by the direction of the House of Commons, one of the persons charged in the information to have been bribed by the defendant was called as a witness; and, on his declining to answer any questions with respect to the alleged bribery, the counsel for the Crown handed him a pardon under the Great Seal; which the witness accepted, but still declined to answer: held, that the possible risk of impeachment by the House of Commons, notwithstanding the pardon under the Great Seal, according to the Act of Settlement, 12 & 13 W. 3. c. 2. s. 3., was not a sufficient ground to entitle him to the privilege of not answering. *The Queen v. Boyes*, 311.

II. On the trial of an information for bribery a witness who was called to prove the fact of his having received a bribe from the defendant, objected to give evidence on the ground that the effect of the evidence he was called upon to give would be to criminate himself. Thereupon the counsel for the Crown handed to the witness a pardon under the Great Seal, who accepted it. The witness, however, still objecting to

give evidence, and the Judge entertaining doubts as to whether the witness could be properly compelled to answer, notwithstanding the pardon, an arrangement was come to between the counsel on both sides, with the sanction of the Judge, that the witness should be directed to answer, but that the opinion of this Court should be taken as to whether the privilege of the witness remained notwithstanding the pardon; the counsel for the Crown undertaking, in the event of this Court holding the affirmative, to enter a *nolle prosequi*, if the defendant should be convicted. The defendant having been convicted, this Court granted a rule to shew cause why a new trial should not be had; and, having heard it argued, discharged it, protesting against the course pursued at the trial being drawn into a precedent—as the Court was thereby called on to pronounce a judgment which it was without authority to enforce. *Id.* 312.

BRIDGE.

The stat. 20 *G. 2. c. 22.*, reciting that it was convenient that a bridge should be built across the *Thames* from the parish of *W.* in the county of *S.* to the parish of *S.* in the county of *M.*, for the ease and commerce of the inhabitants of the said counties, and that *S. D.* had proposed to build the bridge enacted that it should be lawful for *S. D.*, his heirs and assigns, and he and they were authorized, and empowered, at their own costs and charges, to build the said bridge. Power was given to cut the banks of the river, and turn any highways leading to the intended bridge: and in consideration of the great charges and expences *S. D.*, his heirs and assigns should be at, not only in building the bridge but also in erecting, repairing and maintaining other matters necessary to be erected, it should be lawful for *S. D.*, his heirs and assigns, from time to time and at all times thereafter, to take for pontage or toll for any passage over the bridge certain sums. A clause reciting that

it might happen that the passage of the bridge might for some time become dangerous or impracticable, enacted that it should be lawful for *S. D.*, his heirs and assigns, to provide and maintain a ferry across the river, and to take the same sums for passage over the river by it as were granted for the toll or pontage: provided that such ferry should not continue longer than should be necessary for repairing or rebuilding the bridge. It was declared that the bridge should be extra-parochial, and not be deemed to be a county bridge. The stat. 20 *G. 3. c. 32.*, reciting that the bridge was in a ruinous condition, and, if not effectually repaired or rebuilt, would be manifestly to the inconvenience of the public, and that *M. D. S.* was the sole proprietor of it, and had proposed to effectually repair or rebuild it, but it had been found by experience that the pontage or toll was greatly inadequate to the expence of building and keeping the same in repair, enacted that it should be lawful for *M. D. S.*, his heirs and assigns, to take the tolls therein specified. This latter Act, also contained a clause re-enacting all the powers and authorities given by the former Act for the purpose of “rebuilding, repairing, altering and keeping in repair the bridge.” In 1859 the principal arch of the bridge (which had been used by the public on payment of the tolls authorized by the said Acts) fell in, and the passage of it became impracticable. The defendant, who had become proprietor of the bridge in 1829, thereupon provided and maintained a ferry across the *Thames* near to the bridge, and for passage over the river by the ferry took the tolls authorized by the Acts. A reasonable time for repairing the bridge having elapsed, the plaintiff, who was the proprietor of an estate near the bridge and had sustained special damage as such from the neglect to repair it, brought an action against *M. D. S.* for damages, by reason of the bridge being impracticable. Held, by this Court, and affirmed by the Exchequer Chamber that the above statutes imposed upon

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the defendant, as proprietor of the bridge, the duty to repair and maintain it as long as he received the tolls. *Nicholl and others v. Allen*, 916.

BRISTOL AND EXETER RAILWAY COMPANY.

I. *The Bristol and Exeter Railway Company* was incorporated by stat. 6 & 7 W. 4. c. xxxvi., by which it was enacted (inter alia), sect. 174, that all persons should have free access to use the railway with carriages constructed as directed by the Act. Sect. 175, that the Company might charge a tonnage of so much per mile upon all things conveyed along the railway. Sect. 177, that the Company might provide locomotive engines or other power for drawing things upon the railway, and receive such sums for the use of them as they should think proper, in addition to the other sums authorized to be taken. Sect. 178, that they might use locomotive engines or other power, and, in carriages or waggons propelled thereby, convey things along the railway, and make such reasonable charges for conveyance as they might determine upon, in addition to the rates or tolls authorized to be taken. By sect. 183 they were likewise authorized to fix the sum to be charged for small parcels not exceeding 500 lbs weight each. Sect. 184 enacted that where things or persons were conveyed for a less distance than six miles, the Company might demand and receive the aforementioned "rates, tolls and charges for conveyance" for six miles; and sects. 185, 186 and 187 contained certain other provisions relative to "rates and tolls only." By sect. 188, they were directed to affix on boards upon their toll houses &c., a list of the rates and tolls directed by them to be taken. By stat. 8 & 9 Vict. c. clv. s. 2. the powers of former Acts regulating the Company are extended to that Act, except such as expired by effluxion of time, or are inapplicable to it, or inconsistent with or provided for by The Lands Clauses Consolidation Act, or with such of the provi-

sions of The Railways Clauses Consolidation Act as were made applicable to that Act. Sect. 18 fixed the sum which the Company might charge for passengers; and sect. 19 gave a scale of so much per ton per mile, in respect of articles conveyed on the railway. *A. B.* delivered goods to the Company to be carried. These were of different kinds, and were made up in packages, some of which exceeded, and others of which did not exceed 500 lbs. weight each. The charges made by the Company and paid by *A. B.* for the carriage of the goods on the railway amounted to sums which, (after deducting reasonable sums for the expenses of loading and unloading), exceeded the maximum sums authorized to be charged for the carriage of the several kinds of goods respectively by stat. 8 & 9 Vict. c. clv. s. 19.: Held that *A. B.* was entitled, under a count for money had and received, to recover back the sums paid by him in excess of the sums authorized to be charged for carriage of goods by 8 & 9 Vict. c. clv. upon such of those packages of goods as exceeded 500 lbs. in weight, but not upon the rest.

II. The above Company published a scale of charges at which parcels would be carried along their line, including collection and delivery within certain limits, if delivered by the Company's appointed agents. *A. B.*, a carrier, in the course of his business as such, forwarded from *Bristol*, by passenger and van trains on the railway, parcels of goods which were consigned to his agents residing at various towns and places on the line of the railway for delivery by such agents. On all such occasions the parcels in question were collected by *A. B.* from his customers in *Bristol*, and were taken by him with his own horses, carts and servants to the railway station there, from whence they were forwarded to some other station on the railway. On other occasions the agents of *A. B.* residing at *Exeter* and other places on the line of the railway, forwarded thence by passenger and van trains to *A. B.* at *Bristol* parcels of goods for delivery in *Bristol*. On all such last mentioned

occasions the parcels were received by *A. B.* at the railway station at *Bristol* and from thence delivered by him, in his own carts and vans, to the parties in *Bristol* to whom they were directed. The sums paid by *A. B.* to the Company for the carriage on the railway of all the above mentioned parcels which were so respectively forwarded and received by *A. B.* included, in accordance with the rates fixed by the said scale bills, charges for collection and delivery in *Bristol*, though such services were not in fact performed by the Company for *A. B.* : Held that these sums were improperly charged, and might be recovered back under a count for money had and received.

III. The above Company charged *A. B.* certain sums, reasonable in themselves, for carrying his goods along their line, while they carried the like goods for other parties at lower rates : Held that *A. B.* was not entitled, in an action for money had and received, to recover from the Company the excess of the sums paid by him above those paid by the other parties.

IV. In the case of the same Company, whenever any of the public (not being carriers) brought and delivered at one time a number of separate parcels or packages to the Company to be carried, if they all contained goods of the same kind or description (such as drugs or drapery), and were addressed to the same party, the Company were in the habit of charging them in the aggregate according to the parcels rates where the aggregate weight did not exceed 500 lbs., and according to the lower or tonnage rates where the aggregate weight exceeded 500 lbs. Whereas if *A. B.* brought a number of separate parcels or packages of the same kind to the Company to be carried, which (though addressed also to the different ultimate consignees for whom they were intended) bore a separate address to *A. B.*, and at the end of the journey were received by him or his agents from the Company, the Company charged *A. B.* for each parcel or package separately. If (as occasion-

ally happened), amongst a number of separate packages so brought by *A. B.* to the Company to be carried, two or more of the same kind were found to be addressed to the same ultimate consignee, the Company aggregated those which were so addressed to the same ultimate consignee, but refused to aggregate the others : Held, that the Company were justified in so charging.

V. In the case of the same Company it appeared that, on various occasions since the publication of the scale bills, *A. B.* brought and delivered goods to the Company to be conveyed, for the conveyance of which goods the Company demanded, and *A. B.* paid, sums exceeding the rates specified in the scale bills. These sums were, in some instances, demanded by the Company's servants through mistake ; in other instances the demand was made intentionally : Concessum, that this claim of the Company could not be supported.

VI. *Semble*, that, in order to entitle the above Company to make any of the above charges, they were not bound to affix to their toll-houses &c. boards indicating the amount of their rates and tolls ; but Held that, if they even were, their having neglected to do so did not entitle *A. B.* to recover back as money had and received, any of the above payments made by him. *Garton and another v. The Bristol and Exeter Railway Company*, 112.

BROKER.

The defendants, merchants and shipbrokers at *Bristol*, who had before acted as agents for the plaintiffs, merchants at *Liverpool*, in shipping iron, offered to them some "good old scrap iron" belonging to *O.* (for whom they were also acting as brokers, specifying the descriptive quality and price of the iron. The plaintiffs asked for an offer of cost and freight from *Bristol* to *Rotterdam*, and a further description of the iron. The defendants wrote and gave the description ;

and afterwards wrote naming a ship, and the rate of freight. The plaintiffs agreed to purchase the iron at the price proposed, but objected to the ship; and the iron was subsequently shipped at *Bristol* on board another ship, chartered by the defendants on behalf of plaintiffs. The sold note for the iron, sent by the defendants, was signed by *O.*, and stated the iron to be "sold" to the defendants "for their principals," and to be "weighed and delivered alongside a vessel or vessels." The defendants received no remuneration from the plaintiffs, but received commission from *O.* and from the owners of the ship. The iron afterwards turned out to be of a much inferior quality to that agreed upon. In an action by the plaintiffs against the defendants for negligence in accepting and shipping at *Bristol*, and paying *O.* for, iron of that inferior quality: Held by the Court of Queen's Bench, that the defendants were not liable: that they acted in the transaction in two capacities, viz., as brokers between the plaintiffs and *O.*, in negotiating the sale of the iron; and, subsequently, as agents for plaintiffs in receiving and forwarding the iron: that the two retainers were distinct; and that, as shipping agents under the latter, the defendants were not bound, and had no authority, in the absence of any usage to that effect, to accept or reject, on behalf of the plaintiffs, on its arrival at *Bristol*, the iron of which they had previously, as brokers only, negotiated the purchase, and this judgment was affirmed in the Exchequer Chamber. *Zwischenbart and others v. Alexander and others*, 234.

BURIAL GROUND.

Stat. 18 & 19 *Vict. c. 128. s. 18.*, which enacts that, in every case in which any order in council is issued for the discontinuance of burials in any churchyard or burial ground, the Burial Board or Churchwardens shall maintain such churchyard or burial ground of any parish in decent order, and also do the necessary repair of

CALLS.

the walls and other fences thereof, and the expences shall be repaid by the overseers, upon the certificate of the Burial Board or Churchwardens, out of the poor rate of the parish or place in which such churchyard or burial ground is situate, unless there shall be some other fund legally chargeable with such expences, does not apply to a burial ground which is not a burial ground of any parish, but is the property of private persons. *The Queen v. The Burial Board for the Parishes of St. John, &c., Newcastle upon Tyne*, 679.

CALLS.

See *Company*.

CARRIER.

See *Common Carrier*.

CASE FOR OPINION OF SUPERIOR COURT.

See *Quarter Sessions, Case reserved by*.

CERTIFICATE.

Of justice of the peace.

Where, under 9 *G. 4. c. 31. ss. 27—29.*, a complaint of assault or battery has been made to two justices of the peace, who dismiss the complaint and give the party a certificate accordingly, the certificate may be pleaded in bar to an indictment, founded on the same facts, charging assault and battery, accompanied by malicious cutting and wounding so as to cause grievous or actual bodily harm. *The Queen, on the prosecution of Finney, v. Elrington and another*, 688.

Of registry. See *Merchant Shipping Act*.

CHARITABLE PURPOSES.

The Society of Licensed Victuallers, founded for the purpose of relieving distressed members from its funds, was incorporated by Royal charter. The Society maintained a school for the education, free of charge, of the children of decayed or deceased licensed victuallers; and possessed a school house and other premises, used for that purpose. The charter provided that the management of the Society should be entrusted to a Governor and Committee: and that the members of the Society should meet quarterly, and should have power, at such meetings, to make by-laws. One of these by-laws, so made, provided that these quarterly meetings should be held in the premises of the Society's school, or at such other place as the Governor and Committee might appoint. These meetings were accordingly held on the premises. On appeal by the Society against a poor rate, a general rate for defraying the expenses of The Metropolis Local Management Act, and a sewers rate for defraying the expenses of the main drainage, assessed upon them in respect of the premises in question: Held, that the Society had a beneficial occupation of the premises, and were rateable in respect of them. *The Queen v. The Governors, &c., of The Licensed Victuallers' Society*, 71.

CHURCH RATE.

I. Declaration against justices of the peace alleged that the plaintiff was rated to a church rate, which was demanded on the 8th September, 1857: that the plaintiff was summoned for non payment thereof on the 5th May, 1859; that at the hearing, on the 12th May, 1859, the plaintiff gave evidence that the rate had been demanded of him and the matter of complaint had arisen more than six months before the complaint, and contended that, by stat. 11 & 12 Vict. c. 43. s. 11., the defendants had no jurisdiction: yet the defendants made

an order for payment of the rate, which order had been quashed. Plea, that upon the hearing of the complaint it was proved that, besides the demand of the rate in the declaration mentioned, the same was again demanded on the 25th March 1859, and the complaint was laid within six calendar months from the time of that demand. Upon demurrer, held, that it was within the duty of the defendants, as justices, to determine the question whether a complaint was made within the time limited; and therefore, by sect. 1 of stat. 11 & 12 Vict. c. 44., the action was not maintainable without proof of malice and want of reasonable and probable cause. *Sommerville v. Mirehouse and another*, 652.

II. Declaration against justices of the peace alleged that the plaintiffs were rated to a church rate, the validity of which rate was disputed by them; that they were summoned for non payment of the rate; that at the hearing before the defendants the plaintiffs, in good faith disputing the validity of the rate, gave the defendants notice thereof: yet the defendants, not acting *bonâ fide* in the belief that they were acting in conformity to law, and when they well knew that they had not jurisdiction to proceed, made an order for payment of the rate, which order was afterwards quashed, and issued their warrant of distress, by virtue of which the goods of the plaintiffs were distrained. Plea, as to the distraining of the goods of the plaintiffs; that the warrant was issued on the application of the churchwardens, and executed by their direction as well as by the command of the defendants; and that the plaintiffs afterwards recovered judgment in replevin against the churchwardens. Upon demurrer, held,

1. That the allegations in the declaration sufficiently shewed that the defendants knew that the validity of the rate was *bonâ fide* disputed, and that proper notice thereof was given to them; and therefore, by the proviso to sect. 7 of stat. 53 G. 3. c. 127., they acted without jurisdiction in making the order and warrant.

B. & S.

2. The action was, therefore, by sect. 2 of stat. 11 & 12 Vict. c. 44., maintainable without proof of malice and want of reasonable and probable cause.

3. *Semble*, per *Blackburn J.* If the defendants acted erroneously under the belief that the validity of the rate was not *bonâ fide* disputed, the action would be within sect. 1 of stat. 11 & 12 Vict. c. 44.

4. The proviso in sect. 7 of stat. 53 G. 3. c. 127., which takes away the jurisdiction of justices where the validity of the rate is *bonâ fide* disputed, extends to Quakers. *Pease and others v. Chaytor and another*, 658.

CLAIM.

See *Lands Clauses Consolidation Act*.

CLERKSHIP, ARTICLES OF.

See *Articles of Clerkship*.

COLONY, LAW OF.

See *Insolvent*, IV.

COMMON CARRIER.

1. A railway Company, carrying on business as common carriers for hire, refused to receive certain goods tendered to them for carriage as such, unless the sender of the goods would sign a condition by which the Company were not answerable "for the loss, detention or damage of any package insufficiently or improperly packed, marked, directed or described": Held, an unjust and unreasonable condition, both at common law and under the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31. *Garton and another v. The Bristol and Exeter Railway Company*, 112.

2. *Semble*, per *Cockburn, C. J.*, that a condition imposed by a railway Company carrying on business as common carriers for hire, that "no claim for damage will be allowed unless made within three days after the delivery of the goods, nor for loss unless made within three days of

COMMON MEMORANDUM.

the time that they should be delivered," is unjust and unreasonable. *Id.*

3. A railway Company, carrying on business as common carriers for hire, refused to receive the goods of *A. B.* on the ground that they were tendered after a quarter past five in the evening, although they did receive the goods of *C. D.* at a later hour: Held, that, in the absence of explanation, this was unlawful conduct in the Company, and *A. B.* having sustained damage in consequence of it, was entitled to recover against them. *Id.*

4. A declaration alleged that a railway Company, carrying on business as common carriers for hire, refused to carry certain goods unless the sender of the goods would sign certain "unjust and unreasonable conditions": Held, that, this allegation was satisfied by proof that one of the conditions thus required to be signed was unjust and unreasonable. *Id.*

COMMON MEMORANDUM.

Five per cent. clause in.

See *Marine Insurance*, II. 3.

COMPANY.

The declaration stated that the defendant was the holder of fifty shares in the plaintiffs' Company, and indebted in respect of seven calls, whereby an action had accrued to the plaintiffs against him under and by virtue of their deed of settlement. Pleas. 1. Never indebted. 2. That the defendant was not the holder of the shares. 3. That the deed was not his deed. Replication to the third plea, setting out the charter of incorporation, whereby Her Majesty willed that the capital should be 120,000*l.* divided into 6000 shares: that all the proprietors of the stock of the corporation should execute a deed of settlement whereby the capital should be divided into those shares, to be numbered in regular succession, beginning with 1, and whereby they should enter

into covenants for payment of the sums subscribed by them when called for: that such a deed was executed (various clauses were set forth), and that the defendant was a shareholder and had paid certain calls. Before the charter was granted the brokers to the Company had put down the name of the defendant, without his authority, as an applicant for shares, and the promoters allotted to him fifty shares, and sent an allotment letter informing him thereof, and requiring a deposit of 1*l.* per share, adding, "and on your execution of the deed prepared in conformity with the provisions of the Royal charter, you will be entitled to fifty share certificates of the Company." The defendant paid the deposit of 1*l.* a share. The charter was afterwards granted, and the deed prepared and executed by many shareholders, but not by the defendant. In the deed were the following clauses, which were substantially the same as those contained in The Companies Clauses Consolidation Act, 1845, 8 & 9 *Vict. c. 16.*:—3. The shares shall be numbered in regular succession, beginning with 1; and every share shall be distinguished by its separate number.—5. Every person who shall have subscribed the prescribed sum to the capital, or shall otherwise have become entitled to a share of the same, and whose name shall have been entered on the register of shareholders, shall be deemed a shareholder.—6. The corporation shall keep a book to be called "The Register of Shareholders," in which shall be entered the names of the persons entitled to shares, together with the number of shares to which such persons are entitled, distinguishing each share by its number, and the amount of instalments paid on such share.—8. A certificate of ownership, under the corporation seal, shall be delivered to each shareholder; and such certificate shall specify the share in the undertaking to which such shareholder is entitled.—65. In an action for calls, it shall be sufficient to declare that the defendant is owner of one share or more "(stating the number of shares)," and is indebted in respect of one call

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or more, whereby an action hath accrued to the corporation by virtue of the deed.—66. On the trial it shall be sufficient to prove that the defendant, at the time of the call, was a holder of one share or more.—It was represented by the prospectus issued shortly before the date of the charter, and by the letter of allotment, that no more than three calls should be made until the Company's works should be in operation. The defendant had paid four calls, but refused to pay the calls in question.

1. Held by the Court of Queen's Bench, and affirmed by the Exchequer Chamber, that shares were not created so as to make the alleged owner liable to calls.

2. Held, by the Exchequer Chamber, that the defendant was not a shareholder, as he had not executed the deed of settlement.

3. *Semble*, that after acceptance of the shares and payment of the calls, especially the call made after those specified in the prospectus and letter of allotment, and the correspondence in which he was treated as a holder of shares, and as he knew of the existence of the charter and the deed, the defendant could not say, as against the other shareholders and the Company, that he was not a shareholder by reason of the stipulations in the prospectus and letter of allotment not having been carried out. *The Irish Peat Company v. Phillips*, 598.

Incorporated Joint Stock (limited).

By stat. 19 & 20 *Vict. c. 108. s. 39.*, in certain cases, if a defendant objects to the action being tried in the County Court, and gives security to be approved of by the registrar, the action shall be stayed; and by sect. 70 "such security shall be at the cost of the party giving it, and in the form of a bond, with sureties to the other party;" and in the form given in the Schedule of Forms to the Rules of Practice of the County Courts, the bond purports to be executed by the party and two sureties: Held, that where the defendants were an incorporated joint stock Company, limited, it was within

the scope of their general authority to execute such a bond. *In re Young and The Brompton, Chatham, &c., Waterworks Company (limited)*, 675.

See also *Railway Company*.

COMPROMISE.

I. The compromise of a claim may be a good consideration for a promise, although litigation has not been actually commenced. *Cook and others v. Wright*, 559.

II. The defendant was agent for B., the non-resident owner of houses in a district subject to a local Act. Works had been done by the Commissioners for executing the Act, the expenses of which, under the provisions of the Act, they charged on the owners of the adjoining houses. Notice had been given to the defendant as if he had been owner of these houses, calling on him to pay the proportion chargeable in respect of them. He attended at a meeting of the Commissioners, and objected both to the amount and nature of the charge, and also stated that he was not the owner of the houses, and that B. was. He was told that if he did not pay, legal proceedings would be taken against him. In the result, the amount charged upon the defendant was reduced, and time was given to him to pay it in three instalments, for which he gave three promissory notes. In an action upon the notes by the Commissioners, Held that there was a sufficient consideration for the notes in the compromise. *Id.*

CONCEALMENT OF MATERIAL FACT.

See *Insurance*, II.

CONDITION.

See *Reasonable Condition*, III. IV.

CONDITION PRECEDENT.

See *Reasonable Condition*, II.

CONSENT OF PARTIES.

CONSENT OF PARTIES.

See *Mandamus*, V. VI. VII.

CONSIDERATION.

I. The Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104., enacts that "the certificate of registry shall be used only for the lawful navigation of the ship, and shall not be subject to detention by reason of any title, lien, charge or interest whatsoever which any owner, mortgagee, or other person may have or claim to have on or in the ship described in such certificate: and if any person whatever" "refuses on request to deliver up such certificate when in his possession or under his controul to the person for the time being entitled to the custody thereof for the purposes of such lawful navigation," proceedings may be taken before a justice; "and unless it is proved" "that there was reasonable cause for such refusal, the offender shall incur a penalty not exceeding 100*l.*"; which, or any part of which, by sect. 524, the justice may, if he think fit, direct to be applied in compensating any person for damage sustained by him in consequence of the wrongful act. Held, by the Court of Queen's Bench, and affirmed in the Exchequer Chamber, but with hesitation,

1. That the effect of sect. 50 is to make any pledge of the certificate, for any purpose whatever, though for a good consideration, illegal and void; and, consequently, any detainer of a certificate so pledged illegal.

2. That, where the person entitled to the custody of the certificate for the purposes of navigation is also the owner of the ship, he has a right of action against the party so detaining the certificate, in addition to his remedy, in the former character, by a complaint before a justice. And this, though he be himself the pledger, and for a good consideration. *Wiley v. Crawford and Fenwick*, 253.

II. Quære, by the Court of Queen's Bench, whether an action at law would

lie, by the party merely entitled to the custody, for the detainer made unlawful by the penal part of the enactment. If it would, *semble* that the declaration should, in that case, aver absence of reasonable cause. *Id.*

III. The compromise of a claim may be a good consideration for a promise, although litigation has not been actually commenced. *Cook and others v. Wright*, 559.

IV. The defendant was agent for *B.*, the non-resident owner of houses in a district subject to a local Act. Works had been done by the Commissioners for executing the Act, the expenses of which, under the provisions of the Act, they charged on the owners of the adjoining houses. Notice had been given to the defendant as if he had been owner of these houses, calling on him to pay the proportion chargeable in respect of them. He attended at a meeting of the Commissioners, and objected both to the amount and nature of the charge, and also stated that he was not the owner of the houses, and that *B.* was. He was told that if he did not pay, legal proceedings would be taken against him. In the result, the amount charged upon the defendant was reduced, and time was given to him to pay it in three instalments, for which he gave three promissory notes. In an action upon the notes by the Commissioners, Held that there was a sufficient consideration for the notes in the compromise. *Id.*

V. Declaration stated that, in consideration of an intended marriage between the plaintiff and the daughter of *W. G.*, *W. T.*, the father of the plaintiff, and *W. G.* verbally promised to give their children marriage portions; and that after the marriage *W. G.* and *W. T.*, as a mode of giving effect to their said verbal promises, entered into a written agreement, by which it was mutually agreed that they should pay the sums of 200*l.* and 100*l.* respectively to the plaintiff, and that the plaintiff should have full

power to sue for the same in any Court of law or equity. Breach: non-payment of the 200*l.* by *W. G.*, or by the defendant, his executor: Held, on demurrer, that the action was not maintainable, notwithstanding the near relationship of the plaintiff to the party from whom the consideration moved. *Tweddle v. Atkinson, Executor*, 393.

CONSTRUCTION OF CONTRACT.

Defendants had become responsible, as *del credere* agents, for the purchase of a cargo of wheat of from 1800 to 2000 quarters, to be shipped at the price of 50*s.* per quarter free on board at *Taganrog*, "and including freight and insurance to any safe port in the United Kingdom." "Payment cash in *London* in exchange for shipping documents." Plaintiffs tendered the following shipping documents of a cargo answering the description in the contract: a charterparty; a bill of lading and provisional invoice, in both of which the cargo was stated to be 1850 quarters, at 50*s.* per quarter, 4626*l.*, less freight, at 10*s.* 9*d.* per quarter, 1001*l.* 10*s.*; and a policy of insurance effected on the cargo valued at 3600*l.* On behalf of the plaintiffs evidence was given, which was not contracted, that the policy tendered was sufficient to protect the interest of the shipper of the cargo at the time of shipment. In an action against the defendants for not paying or procuring from their principal payment of the price of the cargo, they pleaded that plaintiffs were not ready and willing to tender, nor did they tender, "the usual shipping documents" according to the contract. Held, that the plaintiffs had so tendered: and they were not bound to tender, as a "shipping document," within the meaning of the contract, a policy covering the full amount of the buyers' risk as it appeared by the provisional invoice and bill of lading. *Tamraco and others v. Lucas and others*, 185.

CONTRADICTING WITNESS.

See *Witness*, I.

the defendant, as proprietor of the bridge, the duty to repair and maintain it as long as he received the tolls. *Nicholl and others v. Allen*, 916.

BRISTOL AND EXETER RAILWAY COMPANY.

I. *The Bristol and Exeter Railway Company* was incorporated by stat. 6 & 7 W. 4. c. xxxvi., by which it was enacted (inter alia), sect. 174, that all persons should have free access to use the railway with carriages constructed as directed by the Act. Sect. 175, that the Company might charge a tonnage of so much per mile upon all things conveyed along the railway. Sect. 177, that the Company might provide locomotive engines or other power for drawing things upon the railway, and receive such sums for the use of them as they should think proper, in addition to the other sums authorized to be taken. Sect. 178, that they might use locomotive engines or other power, and, in carriages or waggons propelled thereby, convey things along the railway, and make such reasonable charges for conveyance as they might determine upon, in addition to the rates or tolls authorized to be taken. By sect. 183 they were likewise authorized to fix the sum to be charged for small parcels not exceeding 500 lbs weight each. Sect. 194 enacted that where things or persons were conveyed for a less distance than six miles, the Company might demand and receive the aforementioned "rates, tolls and charges for conveyance" for six miles; and sects. 185, 186 and 187 contained certain other provisions relative to "rates and tolls only." By sect. 188, they were directed to affix on boards upon their toll houses &c., a list of the rates and tolls directed by them to be taken. By stat. 8 & 9 Vict. c. clv. s. 2. the powers of former Acts regulating the Company are extended to that Act, except such as expired by effluxion of time, or are inapplicable to it, or inconsistent with or provided for by The Lands Clauses Consolidation Act, or with such of the provi-

sions of The Railways Clauses Consolidation Act as were made applicable to that Act. Sect. 18 fixed the sum which the Company might charge for passengers; and sect. 19 gave a scale of so much per ton per mile, in respect of articles conveyed on the railway. *A. B.* delivered goods to the Company to be carried. These were of different kinds, and were made up in packages, some of which exceeded, and others of which did not exceed 500 lbs. weight each. The charges made by the Company and paid by *A. B.* for the carriage of the goods on the railway amounted to sums which, (after deducting reasonable sums for the expenses of loading and unloading), exceeded the maximum sums authorized to be charged for the carriage of the several kinds of goods respectively by stat. 8 & 9 Vict. c. clv. s. 19.: Held that *A. B.* was entitled, under a count for money had and received, to recover back the sums paid by him in excess of the sums authorized to be charged for carriage of goods by 8 & 9 Vict. c. clv. upon such of those packages of goods as exceeded 500 lbs. in weight, but not upon the rest.

II. The above Company published a scale of charges at which parcels would be carried along their line, including collection and delivery within certain limits, if delivered by the Company's appointed agents. *A. B.*, a carrier, in the course of his business as such, forwarded from *Bristol*, by passenger and van trains on the railway, parcels of goods which were consigned to his agents residing at various towns and places on the line of the railway for delivery by such agents. On all such occasions the parcels in question were collected by *A. B.* from his customers in *Bristol*, and were taken by him with his own horses, carts and servants to the railway station there, from whence they were forwarded to some other station on the railway. On other occasions the agents of *A. B.* residing at *Exeter* and other places on the line of the railway, forwarded thence by passenger and van trains to *A. B.* at *Bristol* parcels of goods for delivery in *Bristol*. On all such last mentioned

shall be stayed; and by sect. 70 "such security shall be at the cost of the party giving it, and in the form of a bond, with sureties to the other party;" and in the form given in the Schedule of Forms to the Rules of Practice of the County Courts, the bond purports to be executed by the party and two sureties: Held,

1. That the registrar could not decline to approve a bond, on the ground that the defendant was, by law, incompetent to execute a bond.

2. That where the defendants were an incorporated joint stock Company, limited, it was within the scope of their general authority to execute such a bond. *In re Young and The Brompton, Chatham, &c., Waterworks Company (limited)*, 875.

III. Rule 16 of a friendly society provided, that a dispute of any kind whatsoever arising under the rules should be referred to a committee. By rule 22, any member in the receipt of the gifts of the Society being found imposing on the Society was to be expelled. A member of the Society in the receipt of pay was charged with receiving full pay when he was only entitled to half pay, and, the matter being referred to a committee under rule 16, he was expelled, but without being heard before the committee. Upon application for a mandamus to reinstate him as a member of the Society,

1. Held, by *Crompton, Blackburn and Mellor JJ.*, *Cockburn C. J.* dubitante, that the County Court had jurisdiction, under stat. 18 & 19 *Vict.* c. 63. ss. 41, 42, to order him to be reinstated, if he had been improperly expelled.

2. *Quare*, whether this was a dispute within rule 16; but, if it was, held that the County Court might order the Society to hear the applicant. *Ex parte Woolridge*, 844.

Rate.

Stat. 15 & 16 *Vict.* c. 81. ss. 32, 34 and 35, which provides for the collection of the county rate in parishes situate partly within boroughs and partly without, applies only to boroughs "not subject to contribute to the

county rate;" and therefore, where a parish is situate partly within a borough which contributes to the county rate, a separate rate towards the expence of the county police cannot be made upon the part without the borough, though the part within it is governed by a local Act, under which police constables are appointed and paid. *The Queen v. The Overseers of Huddersfield*, 961.

CRIMINATE.

Questions tending to. See *Witness, Privilege of in Not Answering*.

CURATE'S SALARY.

See *Tithe Commutation Rent Charge*, I. II. IV. V.

CUSTOM.

See *Mine*.

DAMAGES.

I. A., professing to have authority from the owners of certain premises, granted a parol lease of them for seven years to B., and let him into possession. The owners, disavowing the authority of A., demanded possession of the premises from B.; and, on his refusal, brought an ejectment against him. B., relying on a statement of A. that he had authority to act as he did and that the ejectment would not be persevered in, and also on the advice of his own attorney, defended the ejectment, but unsuccessfully, and was turned out of possession. B. having brought an action against A. for this false assumption of authority, the jury found that A. had acted *bonâ fide* and without fraud, and through a misapprehension that he had authority. Held that B. was not entitled to recover as damages against A. the costs incurred in defending the ejectment. *Pow v. Davis*, 220.

II. Real estate had been devised to the defendant in trust to sell, who put a part of it up for sale, which the plaintiff agreed to buy, and was ac-

cepted as the purchaser. The defendant was aware that he could not make a title free from incumbrance, as by a marriage settlement the land was vested in trustees to secure an annuity to the widow of the deviser, but he had obtained from her a parol promise that in the event of the sale she would transfer her security to another property. After the sale the widow refused to assent to this, and the bargain went off in consequence. In an action by the plaintiff against the defendant for not completing the bargain, the jury found that the defendant bona fide believed that he would be able to make to the purchaser a good title free from incumbrance, and that he had reasonable grounds for so believing:

1. Held, that the plaintiff, although entitled to recover his deposit and the expences of investigating the title, was not entitled to recover damages for the loss of his bargain: per *Wightman* and *Blackburn JJ.*, dissentiente *Cockburn C. J.*

2. Concessum, on the authority of *Pounsett v. Fuller*, 17 *C. B.* 660, that the expences attendant on an attempt which was made, after the bargain was off, to enter into a fresh arrangement could not be recovered. *Sikes v. Wild and others*, 587.

See *Marine Insurance*.

DEBT, EXTINGUISHMENT OF.

H. recovered judgment in an action against *S.*, and issued a writ of *fi. fa.*, under which *S.*'s goods were seized. On an interpleader issue between *H.* and *M.*, who claimed the goods of *S.* which were so seized, *M.* had a verdict, and obtained an order for his costs, which were taxed. *H.* issued a writ of *ca. sa.* against *S.*, who was arrested. *M.* obtained a Judge's order, under sect. 61 of The Common Law Procedure Act, 1854, 17 & 18 *Vict. c. 125.*, to attach the debt due from *S.* to *H.*; and the amount was allowed in account between *M.* and *H.* *S.* having obtained an order to be discharged out of custody in the action of *H. v. S.*: Held, that *M.* was a judgment creditor of *H.* within the

DECLARATION.

meaning of sect. 61: and that the arrest of *S.*, the garnishee, did not extinguish his debt to *H.*, or bar *M.*'s right to attach it under that section. *Hartley v. Shemwell. Marples v. Hartley*, 1.

DECLARATION.

Of deceased person. See *Evidence*, III.

DEED.

See *Agreement*, I.

Of settlement. See *Company*, I.

DEPARTURE.

Declaration for goods bargained and sold, and goods bargained, sold and delivered. Plea, infancy. Replication on equitable grounds, that the defendant, at the time of the accruing of the causes of action, with knowledge of his true age, falsely and fraudulently represented to the plaintiff that he, the defendant, was of full age, whereby the plaintiff was induced to enter into the contract and supply the goods. On demurrer, held that the replication was a departure from the declaration. *Bartlett v. Wells*, 836.

DETENTION OF CERTIFICATE.

See *Merchant Shipping Act*.

DEVISE.

A testator devised dwelling houses to trustees for the life of his niece *M. S.*, upon trust to permit her to take the rents and profits of the same during her life; and from and immediately after the decease of his niece unto her issue, to be equally divided amongst them at their respective ages of twenty-one years or days of marriage, and to the heirs and assigns of such issue respectively: and if any of such issue should be under the age of twenty-one years at the decease of his niece, he directed an equal share of the rents and profits to be appro-

priated towards the education and maintenance of such issue as should not have attained the age of twenty-one at the decease of his niece: and if his niece should die leaving only one child, then unto such only child, and his or her heirs, as soon as he or she should attain the age of twenty-one. But in case his niece should die without leaving any issue of her body at the time of her decease, or in case all such issue should die under the age of twenty-one years and unmarried, then to his brother's children. *M. S.* married and had one daughter, who attained the age of twenty-one years, but died in the lifetime of *M. S.* unmarried: Held, that, if an estate in fee in remainder vested in the daughter of *M. S.* upon her attaining the age of twenty-one years, such estate was divested upon her death in the lifetime of *M. S.* *Young and Shelton v. Turner*, 550.

See also *Way*.

DISCHARGE.

- I. Of insolvent debtor. See *Insolvent*.
- II. Of jury. See *Jury*.

DOCK WARRANT.

See *Factor*, II.

DONATIO MORTIS CAUSA.

A policy of life insurance may be the subject of a donatio mortis causa. *Witt, administrator v. Amis*, 109.

DOUBLE PLEADING.

Information by *The Attorney General* for bribery at an election of a member of Parliament. Plea, not guilty. At the trial, a material and necessary witness for the Crown refused to give evidence, and was committed for contempt; whereupon, at the application of the counsel for the Crown, the defendant objecting, the Judge discharged the jury from giving

any verdict. The Court refused to allow the defendant to add a plea puis darrein continuance, stating the above facts: on the ground that this would be to allow double pleading; and also, as the facts would be set out on the record, the defendant could take advantage of them. *The Queen v. Charlesworth*, 460.

EMANCIPATION.

See *Removeability*.

EQUITABLE GROUNDS, REPLICATION ON.

Declaration for goods bargained and sold, and goods bargained, sold and delivered. Plea, infancy. Replication on equitable grounds, that the defendant, at the time of the accruing of the causes of action with knowledge of his true age, falsely and fraudulently represented to the plaintiff that he, the defendant was of full age, whereby the plaintiff was induced to enter into the contract and supply the goods. On demurrer, held

1. That the replication was no answer to the plea either at law, or as an equitable replication, under sect. 85 of The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.

2. That it was a departure from the declaration. *Bartlett v. Wells*, 836.

EVIDENCE.

I. In an action against a railway Company to recover a piece of superfluous land which the Company were bound to dispose of within ten years after it had been acquired by them, the plaintiff proposed to shew that, thirteen years after that time, the Company put the land up for sale by public auction as superfluous land. In order to prove this, the auctioneer was called as a witness, who deposed that he had received his instructions for the sale from one of the directors of the Company, and also from a person who had acted as their solicitor on former sales of land; held that this was not even *prima facie* proof that

the sale was by the authority of the Company; although more than twelve months had elapsed between the sale and the trial. *Moody v. The London, Brighton and South Coast Railway Company*, 290.

II. The grounds of removal of a female pauper stated a derivative settlement from her great-grandfather; and alleged an acknowledgment of that settlement by relief given to her great-grandmother, and by a collateral relation having been removed to the parish. On the trial of an appeal at the Quarter Sessions against the order of removal, the respondents offered evidence to shew the removal to the appellant parish of another collateral relation—the wife of a grandson of the common ancestor—on a settlement also derived from him. This evidence was objected to, but received, and the question of its admissibility was reserved for this Court: held

Per *Hill and Crompton JJ.*, dubitante *Cockburn C. J.*, that the evidence was receivable. *The Queen v. The Inhabitants of Ruyton*, 534.

III. On an appeal against an order of removal of a female pauper, it was shewn that the father of the pauper's husband had occupied and paid rent for a tenement in the appellant parish. In order to prove the amount of that rent, the respondents' counsel offered to shew that, whilst in occupation of that tenement, the father said to his son that he occupied the same as tenant at an annual rent of 20l.: held, that the evidence was admissible. *The Queen v. The Overseers of Birmingham*, 763.

IV. Scintilla of.

Per *Crompton J.* The doctrine that if there is only a scintilla of evidence for the jury the verdict of the jury is not to be disturbed, is now exploded. *Mellors v. Shaw and Unwin*, 437.

EXECUTOR.

Where a person is assessed to the poor rate in respect of his own pro-

EXTINGUISHMENT OF DEBT.

perty, and is also executor of a person whose executors are assessed in respect of property of the deceased, he is entitled to vote at a vestry, under 58 G. 3. c. 69., if the two assessments make up the required amount. *The Queen v. Kirby*, 647.

EXTINGUISHMENT OF DEBT.

See *Debt*.

FACTOR.

I. The Factors' Acts, 6 G. 4. c. 94. and 5 & 6 Vict. c. 39., do not apply to the case of master and servant. *Lamb v. Attenborough*, 831.

II. Where a wine merchant gave authority to his clerk to sign delivery orders in his master's name, and receive dock warrants in his own, which he likewise authorized him to pledge for the purposes of the master's business, the clerk having fraudulently deposited some of these dock warrants with a pawnbroker as a security for money bonâ fide lent to him: held, that the clerk was not an agent within the Factors' Acts, 6 G. 4. c. 94. and 5 & 6 Vict. c. 39., and, consequently, that the merchant was entitled to recover the dock warrants from the pawnbroker. *Id.*

FRAUD.

See *Pleading, Equitable*.

FRAUDS.

Statute of. See *Statute of Frauds*.

FRIENDLY SOCIETY.

Rule 16 of a friendly society provided, that a dispute of any kind whatsoever arising under the rules should be referred to a committee. By rule 22, any member in the receipt of the gifts of the Society being found imposing on the Society was to be expelled. A member of the Society in the receipt of pay was charged

with receiving full pay when he was only entitled to half pay, and, the matter being referred to a committee under rule 16, he was expelled, but without being heard before the committee. Upon application for a mandamus to reinstate him as a member of the Society,

1. Held, by *Crompton, Blackburn and Mellor JJ.*, *Cockburn C. J.* dubitante, that the County Court had jurisdiction, under stat. 18 & 19 *Vict. c. 63. ss. 41, 42*, to order him to be reinstated, if he had been improperly expelled.

2. *Quære*, whether this was a dispute within rule 16; but, if it was, held that the County Court might order the Society to hear the applicant. *Ex parte Woodbridge*, 844.

GAME.

I. An indictment, under stat. 9 *G. 4. c. 69.*, alleged that the defendant, on &c., was duly convicted before &c., three justices of the peace, for that he, in the night of 18th *December* 1854, by night, after the expiration of the first hour after sunset, and before the beginning of the first hour before sunrise, did by night then and there unlawfully enter a certain close &c. with a gun, for the purpose of then and there taking and destroying game, contrary to the statute &c., and was adjudged for the said offence, the same being his first offence, &c. That the defendant afterwards, to wit &c., was duly convicted before &c., two justices of the peace &c., for that he, in the night of 24th *November* 1858, by night, unlawfully did enter and be in and upon certain enclosed land &c., with certain instruments, for the purpose of killing, taking and destroying game thereon, this being his second offence, contrary to the form &c., and was adjudged for his said offence, &c. That the defendant, after he had been so twice convicted as aforesaid, to wit 25th *November* 1860, by night, did unlawfully enter and be in and upon certain enclosed land for the purpose, by night, as aforesaid, of therein taking and destroying game, and was then and there

by night unlawfully in the said land, with a certain gun and other instruments, for the purpose, by night as aforesaid, of therein taking and destroying game, against the form of the statute &c.: Held, that this indictment was good, seeing that it did not profess to set out the prior convictions "in hæc verba." *Cureton v. The Queen (in error)*, 208.

II. *Quære*, whether it was not good at all events? *Id.*

III. A conviction, under stat. 9 *G. 4. c. 69.*, alleging that the defendant, by night, after the expiration of the first hour after sunset, and before the beginning of the first hour before sunrise, did, by night, then and there unlawfully enter a certain close &c., with a gun, for the purpose of then and there taking and destroying game, contrary to the statute &c., is good. *Id.*

IV. *Quære*, per *Cockburn C. J.* and *Hill J.*, as to the decision in *Fletcher v. Calthrop*, 6 *Q. B.* 880? *Id.*

GARNISHEE.

H. recovered judgment in an action against *S.*, and issued a writ of *fi. fa.*, under which *S.*'s goods were seized. On an interpleader issue between *H.* and *M.*, who claimed the goods of *S.* which were so seized, *M.* had a verdict, and obtained an order for his costs, which were taxed. *H.* issued a writ of *ca. sa.* against *S.*, who was arrested. *M.* obtained a Judge's order, under sect. 61 of The Common Law Procedure Act, 1854, 17 & 18 *Vict. c. 125.*, to attach the debt due from *S.* to *H.*; and the amount was allowed in account between *M.* and *H.* *S.* having obtained an order to be discharged out of custody in the action of *H. v. S.*: Held, that *M.* was a judgment creditor of *H.* within the meaning of sect. 61: and that the arrest of *S.*, the garnishee, did not extinguish his debt to *H.*, or bar *M.*'s right to attach it under that section. *Hartley v. Shemwell. Marples v. Hartley*, 1.

W. 3. c. 2. s. 3., which enacts that no pardon under the Great Seal shall be pleadable in bar to an impeachment by the Commons in Parliament, renders a pardon under the Great Seal wholly inoperative to prevent impeachment by the House of Commons, and so get rid of the judgment of the House of Lords; for that purpose a subsequent pardon must be granted by the Crown: per *Cockburn C J.*, *Crompton* and *Hill JJ.*; dubitante *Blackburn J.* *The Queen v. Boyes*, 311.

II. On the trial of an information for bribery, filed by *The Attorney General* by the direction of the House of Commons, one of the persons charged in the information to have been bribed by the defendant was called as a witness; and, on his declining to answer any questions with respect to the alleged bribery, the counsel for the Crown handed him a pardon under the Great Seal; which the witness accepted, but still declined to answer: held, that the possible risk of impeachment by the House of Commons, notwithstanding the pardon under the Great Seal, according to the Act of Settlement, 12 & 13 *W. 3. c. 2. s. 3.*, was not a sufficient ground to entitle him to the privilege of not answering. *Id.*

INCLOSURE ACT.

See *Mine*.

INCORPORATED JOINT STOCK COMPANY (LIMITED.)

See *Company, Incorporated Joint Stock (limited)*.

INFANCY.

Declaration for goods bargained and sold, and goods bargained, sold and delivered. Plea, infancy. Replication on equitable grounds, that the defendant, at the time of the accruing of the causes of action, with knowledge of his true age, falsely and fraudulently represented to the plaintiff

INJURY TO PERSON, &c.

that he, the defendant, was of full age, whereby the plaintiff was induced to enter into the contract and supply the goods. On demurrer, held that the replication was no answer to the plea either at law, or as an equitable replication under sect. 85 of The Common Law Procedure Act, 1854, 17 & 18 *Vict. c. 125.* *Bartlett v. Wells*, 836.

INJURY TO PERSON VOLUNTEERING ASSISTANCE.

While the defendant's porters were lowering bales of cotton from the defendant's warehouse, and his carter was receiving them into his lorry, the plaintiff, who was waiting with a lorry to receive a load of cotton for his master, at the request of the defendant's carter assisted him, and, in consequence of the negligence of the defendant's porters, a bale of cotton fell upon and injured him. There was no negligence or want of reasonable care on the part of the plaintiff or of the defendant's carter. Held, that the defendant was not liable to an action. *Potter v. Faulkner*, 800.

INSOLVENT.

I. If a bill of exchange be substantially described in the schedule of a party who has taken the benefit of the Insolvent Debtors' Act, 1 & 2 *Vict. c. 110.*, an unintentional mistake in the description, either of the bill or of the parties to it, will not prejudice the insolvent. *Romellio v. Haloghan*, 279.

II. A bill of exchange for 45*l.*, dated 30th October 1858, had been drawn by an insolvent upon, and accepted by, A., but in his schedule the insolvent described the bill as drawn by A. and accepted by himself, and dated about November 1858. The insolvent being afterwards sued on this bill, pleaded his discharge under the Act, when the jury having found upon the evidence that the misdescription was by mistake: held, that the defendant was entitled to the verdict. *Id.*

III. *Semble*, per *Crompton J.* If an insolvent knows that a bill of exchange on which he is liable has been indorsed over to some person unknown, it is better for him to say so in his schedule. *Id.*

IV. In an action on a bill of exchange drawn and accepted in *England*, and also for money lent, interest, and on accounts stated in *England*, the defendant pleaded a discharge under the insolvent law of the colony of *Victoria*, not alleging that either the plaintiff or the defendant was domiciled in that colony: held, no answer to the action. *Bartley v. Hodges*, 375.

V. Under the Insolvent Debtors' Act, 1 & 2 *Vict. c. 110.*, it is not a condition on the non-vesting in the assignees of privileged articles of the insolvent not exceeding the value of 20*l.*, that those articles be specified by him in his schedule. *Willmer v. Jacklin*, 641.

VI. *Quære*, when the value of such articles exceeds 20*l.*? *Id.*

INSURANCE.

I. A policy of life insurance may be the subject of a *donatio mortis causa*. *Will, administrator, v. Amis*, 109.

II. *A.*, as agent for a foreign owner, entered into a policy of insurance on a ship in the usual form. At the time of effecting the insurance, *A.* was in possession of a letter from the captain, informing him that the ship had received injury, which fact he, without fraudulent intention to deceive, omitted to disclose to the underwriters. The ship was lost, and *B.*, one of the underwriters, paid to *A.* his amount of the insurance; but, having subsequently become acquainted with the above circumstance, brought an action for money had and received against him to recover it back. *A.*, before he was aware of *B.*'s intention to dispute the policy, and acting *bonâ fide* throughout, transmitted to his principal the money he had received from

the various underwriters; with the exception of a certain amount for which he had allowed the principal credit in a settled account, and of another which, with the authority of the principal, he had expended in a suit brought by him on behalf of the principal against *C.*, another underwriter on the policy: held,

1. That, in consequence of the concealment from the underwriters of the fact stated in the captain's letter, the policy was voidable at the election of the underwriters.

2. That *A.*, being only an agent, of which *B.* was aware, and having, without notice of *B.*'s intention to repudiate the contract, paid over to his principal the amount received from the underwriters, *B.* was not entitled to recover back from *A.* his amount of the insurance.

3. That there was no difference in this respect between the money actually paid over by *A.* to his principal, and the moneys which had either been allowed in account between them or expended in the suit against *C.*

4. *Quære*, whether *B.* would have been entitled to recover, if he had not known that *A.* was acting merely as agent? *Holland v. Russell*, 424.

III. 1. A policy of insurance was entered into with a Company against bodily injury from any railway accident directly affecting the assured while travelling on any line of railway in *Great Britain or Ireland* by a passengers train propelled by steam power. One of the conditions in the deed of settlement of the Company, which by the terms of the policy was incorporated with it, provided that, before payment of the sum insured by any policy, proof satisfactory to the directors of the Company should be furnished by the claimant of the death or accident, together with such further evidence or information, if any, as the directors should think necessary to establish the claim: held, that this must be understood to mean such evidence or information as the directors might reasonably, and not such as they might unreasonably and capriciously require. *Braunstein v.*

the scope of their general authority to execute such a bond. *In re Young and The Brompton, Chatham, &c., Waterworks Company (limited)*, 675.

See also *Railway Company*.

COMPROMISE.

I. The compromise of a claim may be a good consideration for a promise, although litigation has not been actually commenced. *Cook and others v. Wright*, 559.

II. The defendant was agent for *B.*, the non-resident owner of houses in a district subject to a local Act. Works had been done by the Commissioners for executing the Act, the expenses of which, under the provisions of the Act, they charged on the owners of the adjoining houses. Notice had been given to the defendant as if he had been owner of these houses, calling on him to pay the proportion chargeable in respect of them. He attended at a meeting of the Commissioners, and objected both to the amount and nature of the charge, and also stated that he was not the owner of the houses, and that *B.* was. He was told that if he did not pay, legal proceedings would be taken against him. In the result, the amount charged upon the defendant was reduced, and time was given to him to pay it in three instalments, for which he gave three promissory notes. In an action upon the notes by the Commissioners, Held that there was a sufficient consideration for the notes in the compromise. *Id.*

CONCEALMENT OF MATERIAL FACT.

See *Insurance*, II.

CONDITION.

See *Reasonable Condition*, III. IV.

CONDITION PRECEDENT.

See *Reasonable Condition*, II.

CONSENT OF PARTIES.

CONSENT OF PARTIES.

See *Mandamus*, V. VI. VII.

CONSIDERATION.

I. The Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104., enacts that "the certificate of registry shall be used only for the lawful navigation of the ship, and shall not be subject to detention by reason of any title, lien, charge or interest whatsoever which any owner, mortgagee, or other person may have or claim to have on or in the ship described in such certificate: and if any person whatever" "refuses on request to deliver up such certificate when in his possession or under his controul to the person for the time being entitled to the custody thereof for the purposes of such lawful navigation," proceedings may be taken before a justice; "and unless it is proved" "that there was reasonable cause for such refusal, the offender shall incur a penalty not exceeding 100*l.*"; which, or any part of which, by sect. 524, the justice may, if he think fit, direct to be applied in compensating any person for damage sustained by him in consequence of the wrongful act. Held, by the Court of Queen's Bench, and affirmed in the Exchequer Chamber, but with hesitation,

1. That the effect of sect. 50 is to make any pledge of the certificate, for any purpose whatever, though for a good consideration, illegal and void; and, consequently, any detainer of a certificate so pledged illegal.

2. That, where the person entitled to the custody of the certificate for the purposes of navigation is also the owner of the ship, he has a right of action against the party so detaining the certificate, in addition to his remedy, in the former character, by a complaint before a justice. And this, though he be himself the pledger, and for a good consideration. *Wiley v. Crawford and Fenwick*, 253.

II. *Quære*, by the Court of Queen's Bench, whether an action at law would

lie, by the party merely entitled to the custody, for the detainer made unlawful by the penal part of the enactment. If it would, *seem* that the declaration should, in that case, aver absence of reasonable cause. *Id.*

III. The compromise of a claim may be a good consideration for a promise, although litigation has not been actually commenced. *Cook and others v. Wright*, 559.

IV. The defendant was agent for *B.*, the non-resident owner of houses in a district subject to a local Act. Works had been done by the Commissioners for executing the Act, the expenses of which, under the provisions of the Act, they charged on the owners of the adjoining houses. Notice had been given to the defendant as if he had been owner of these houses, calling on him to pay the proportion chargeable in respect of them. He attended at a meeting of the Commissioners, and objected both to the amount and nature of the charge, and also stated that he was not the owner of the houses, and that *B.* was. He was told that if he did not pay, legal proceedings would be taken against him. In the result, the amount charged upon the defendant was reduced, and time was given to him to pay it in three instalments, for which he gave three promissory notes. In an action upon the notes by the Commissioners, Held, that there was a sufficient consideration for the notes in the compromise. *Id.*

V. Declaration stated that, in consideration of an intended marriage between the plaintiff and the daughter of *W. G.*, *W. T.*, the father of the plaintiff, and *W. G.* verbally promised to give their children marriage portions; and that after the marriage *W. G.* and *W. T.*, as a mode of giving effect to their said verbal promises, entered into a written agreement, by which it was mutually agreed that they should pay the sums of 200*l.* and 100*l.* respectively to the plaintiff, and that the plaintiff should have full

power to sue for the same in any Court of law or equity. Breach: non-payment of the 200*l.* by *W. G.*, or by the defendant, his executor: Held, on demurrer, that the action was not maintainable, notwithstanding the near relationship of the plaintiff to the party from whom the consideration moved. *Tweddle v. Atkinson, Executor*, 393.

CONSTRUCTION OF CONTRACT.

Defendants had become responsible, as *del credere* agents, for the purchase of a cargo of wheat of from 1800 to 2000 quarters, to be shipped at the price of 50*s.* per quarter free on board at *Taganrog*, "and including freight and insurance to any safe port in the United Kingdom." "Payment cash in *London* in exchange for shipping documents." Plaintiffs tendered the following shipping documents of a cargo answering the description in the contract: a charterparty; a bill of lading and provisional invoice, in both of which the cargo was stated to be 1850 quarters, at 50*s.* per quarter, 4626*l.*, less freight, at 10*s.* 9*d.* per quarter, 1001*l.* 10*s.*; and a policy of insurance effected on the cargo valued at 3600*l.* On behalf of the plaintiffs evidence was given, which was not contracted, that the policy tendered was sufficient to protect the interest of the shipper of the cargo at the time of shipment. In an action against the defendants for not paying or procuring from their principal payment of the price of the cargo, they pleaded that plaintiffs were not ready and willing to tender, nor did they tender, "the usual shipping documents" according to the contract. Held, that the plaintiffs had so tendered: and they were not bound to tender, as a "shipping document," within the meaning of the contract, a policy covering the full amount of the buyers' risk as it appeared by the provisional invoice and bill of lading. *Tamraco and others v. Lucas and others*, 185.

CONTRADICTING WITNESS.

See *Witness*, I.

CONVICTION BY JUSTICES OF THE PEACE, &c.

I. On a summary conviction, under stat. 39 & 40 G. 3. c. 89. s. 18., for unlawful possession of naval stores, the Commissioner (or Superintendent, since stat. 2 & 3 W. 4. c. 40. ss. 10., 11.), or justice of the peace, has power, in the alternative, either to inflict a fine or to imprison with hard labour without imposing a fine.

II. Quære whether, in the latter event, an appeal to the Quarter Sessions is given by sect. 21 of that statute?

III. The pendency of an appeal under that section has not the effect of suspending the operation of the sentence.

IV. Summary convictions under that statute are not affected by stat. 11 & 12 Vict. c. 43. *The Queen v. Willmott*, 27.

V. An indictment, under stat. 9 G. 4. c. 69., alleged that the defendant, on &c., was duly convicted before &c., three justices of the peace, for that he, in the night of 18th December 1854, by night, after the expiration of the first hour after sunset, and before the beginning of the first hour before sunrise, did by night then and there unlawfully enter a certain close &c. with a gun, for the purpose of then and there taking and destroying game, contrary to the statute &c., and was adjudged for the said offence, the same being his first offence, &c. That the defendant afterwards, to wit &c., was duly convicted before &c., two justices of the peace &c., for that he, in the night of 24th November 1858, by night, unlawfully did enter and be in and upon certain enclosed land &c., with certain instruments, for the purpose of killing, taking and destroying game thereon, this being his second offence, contrary to the form &c., and was adjudged for his said offence &c. That the defendant, after he had been so twice convicted as aforesaid, to wit 25th November 1860, by night, did unlawfully enter and be in and upon certain enclosed land for the purpose,

CORROBORATION.

by night, as aforesaid, of therein taking and destroying game, and was then and there by night unlawfully in the said land, with a certain gun and other instruments, for the purpose, by night as aforesaid, of therein taking and destroying game, against the form of the statute &c.: Held, that this indictment was good, seeing that it did not profess to set out the prior convictions "in hæc verba." *Cureton v. The Queen* (in error), 208.

VI. Quære, whether it was not good at all events? *Id.*

VII. A conviction, under stat. 9 G. 4. c. 69., alleging that the defendant by night, after the expiration of the first hour after sunset, and before the beginning of the first hour before sunrise, did by night then and there unlawfully enter a certain close &c., with a gun, for the purpose of then and there taking and destroying game, contrary to the statute &c., is good. *Id.*

VIII. Quære, per Cockburn C. J. and Hill J., as to the decision in *Fletcher v. Calthrop*, 6 Q. B. 880? *Id.*

CORROBORATION.

See *Accomplices*.

COSTS.

See *Action on Judgment*.

COUNTY.

Court.

I. A mandamus will not lie to the Lords Commissioners of the Treasury to compel them to pay a debt incurred by a County Court; and this even although Parliament has, upon an estimate made by the Commissioners of the Treasury, voted a sum for the salaries and expences of the County Courts for the year. *In the matter of the Lords Commissioners of the Treasury, ex parte Walmsley*, 81.

II. By stat. 19 & 20 Vict. c. 108. s. 39., in certain cases, if a defendant objects to the action being tried in the County Court, and gives security to be approved of by the registrar, the action

shall be stayed; and by sect. 70 "such security shall be at the cost of the party giving it, and in the form of a bond, with sureties to the other party;" and in the form given in the Schedule of Forms to the Rules of Practice of the County Courts, the bond purports to be executed by the party and two sureties: Held,

1. That the registrar could not decline to approve a bond, on the ground that the defendant was, by law, incompetent to execute a bond.

2. That where the defendants were an incorporated joint stock Company, limited, it was within the scope of their general authority to execute such a bond. *In re Young and The Brompton, Chatham, &c., Waterworks Company (limited)*, 675.

III. Rule 16 of a friendly society provided, that a dispute of any kind whatsoever arising under the rules should be referred to a committee. By rule 22, any member in the receipt of the gifts of the Society being found imposing on the Society was to be expelled. A member of the Society in the receipt of pay was charged with receiving full pay when he was only entitled to half pay, and, the matter being referred to a committee under rule 16, he was expelled, but without being heard before the committee. Upon application for a mandamus to reinstate him as a member of the Society,

1. Held, by *Crompton, Blackburn and Mellor JJ.*, *Cockburn C. J.* dubitante, that the County Court had jurisdiction, under stat. 18 & 19 *Vict. c. 63 ss. 41, 42*, to order him to be reinstated, if he had been improperly expelled.

2. *Quare*, whether this was a dispute within rule 16; but, if it was, held that the County Court might order the Society to hear the applicant. *Ex parte Woolridge*, 844.

Rate.

Stat. 15 & 16 *Vict. c. 81 ss. 32, 34 and 35*, which provides for the collection of the county rate in parishes situate partly within boroughs and partly without, applies only to boroughs "not subject to contribute to the

county rate;" and therefore, where a parish is situate partly within a borough which contributes to the county rate, a separate rate towards the expense of the county police cannot be made upon the part without the borough, though the part within it is governed by a local Act, under which police constables are appointed and paid. *The Queen v. The Overseers of Huddersfield*, 961.

CRIMINATE.

Questions tending to. See *Witness, Privilege of in Not Answering*.

CURATE'S SALARY.

See *Tithe Commutation Rent Charge, I. II. IV. V.*

CUSTOM.

See *Mine*.

DAMAGES.

I. *A.*, professing to have authority from the owners of certain premises, granted a parol lease of them for seven years to *B.*, and let him into possession. The owners, disavowing the authority of *A.*, demanded possession of the premises from *B.*; and, on his refusal, brought an ejectment against him. *B.*, relying on a statement of *A.* that he had authority to act as he did and that the ejectment would not be persevered in, and also on the advice of his own attorney, defended the ejectment, but unsuccessfully, and was turned out of possession. *B.* having brought an action against *A.* for this false assumption of authority, the jury found that *A.* had acted bona fide and without fraud, and through a misapprehension that he had authority. Held that *B.* was not entitled to recover as damages against *A.* the costs incurred in defending the ejectment. *Pow v. Davis*, 220.

II. Real estate had been devised to the defendant in trust to sell, who put a part of it up for sale, which the plaintiff agreed to buy, and was ac-

cepted as the purchaser. The defendant was aware that he could not make a title free from incumbrance, as by a marriage settlement the land was vested in trustees to secure an annuity to the widow of the deviser, but he had obtained from her a parol promise that in the event of the sale she would transfer her security to another property. After the sale the widow refused to assent to this, and the bargain went off in consequence. In an action by the plaintiff against the defendant for not completing the bargain, the jury found that the defendant bona fide believed that he would be able to make to the purchaser a good title free from incumbrance, and that he had reasonable grounds for so believing:

1. Held, that the plaintiff, although entitled to recover his deposit and the expences of investigating the title, was not entitled to recover damages for the loss of his bargain: per *Wightman* and *Blackburn JJ.*, dissentiente *Cockburn C. J.*

2. Concessum, on the authority of *Pounsett v. Fuller*, 17 C. B. 660, that the expences attendant on an attempt which was made, after the bargain was off, to enter into a fresh arrangement could not be recovered. *Sikes v. Wild* and *others*, 587.

See *Marine Insurance*.

DEBT, EXTINGUISHMENT OF.

H. recovered judgment in an action against *S.*, and issued a writ of fi. fa., under which *S.*'s goods were seized. On an interpleader issue between *H.* and *M.*, who claimed the goods of *S.* which were so seized, *M.* had a verdict, and obtained an order for his costs, which were taxed. *H.* issued a writ of ca. sa. against *S.*, who was arrested. *M.* obtained a Judge's order, under sect. 61 of The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125., to attach the debt due from *S.* to *H.*; and the amount was allowed in account between *M.* and *H.* *S.* having obtained an order to be discharged out of custody in the action of *H. v. S.*: Held, that *M.* was a judgment creditor of *H.* within the

DECLARATION.

meaning of sect. 61: and that the arrest of *S.*, the garnishee, did not extinguish his debt to *H.*, or bar *M.*'s right to attach it under that section. *Hartley v. Shemwell*. *Marples v. Hartley*, 1.

DECLARATION.

Of deceased person. See *Evidence*, III.

DEED.

See *Agreement*, I.

Of settlement. See *Company*, I.

DEPARTURE.

Declaration for goods bargained and sold, and goods bargained, sold and delivered. Plea, infancy. Replication on equitable grounds, that the defendant, at the time of the accruing of the causes of action, with knowledge of his true age, falsely and fraudulently represented to the plaintiff that he, the defendant, was of full age, whereby the plaintiff was induced to enter into the contract and supply the goods. On demurrer, held that the replication was a departure from the declaration. *Bartlett v. Wells*, 836.

DETENTION OF CERTIFICATE.

See *Merchant Shipping Act*.

DEVISE.

A testator devised dwelling houses to trustees for the life of his niece *M. S.*, upon trust to permit her to take the rents and profits of the same during her life; and from and immediately after the decease of his niece unto her issue, to be equally divided amongst them at their respective ages of twenty-one years or days of marriage, and to the heirs and assigns of such issue respectively: and if any of such issue should be under the age of twenty-one years at the decease of his niece, he directed an equal share of the rents and profits to be appro-

priated towards the education and maintenance of such issue as should not have attained the age of twenty-one at the decease of his niece: and if his niece should die leaving only one child, then unto such only child, and his or her heirs, as soon as he or she should attain the age of twenty-one. But in case his niece should die without leaving any issue of her body at the time of her decease, or in case all such issue should die under the age of twenty-one years and unmarried, then to his brother's children. *M. S.* married and had one daughter, who attained the age of twenty-one years, but died in the lifetime of *M. S.* unmarried: Held, that, if an estate in fee in remainder vested in the daughter of *M. S.* upon her attaining the age of twenty-one years, such estate was divested upon her death in the lifetime of *M. S.* *Young and Shelton v. Turner*, 550.

See also *Way*.

DISCHARGE.

I. Of insolvent debtor. See *Insolvent*.

II. Of jury. See *Jury*.

DOCK WARRANT.

See *Factor*, II.

DONATIO MORTIS CAUSA.

A policy of life insurance may be the subject of a donatio mortis causâ. *Witt, administrator v. Amis*, 109.

DOUBLE PLEADING.

Information by *The Attorney General* for bribery at an election of a member of Parliament. Plea, not guilty. At the trial, a material and necessary witness for the Crown refused to give evidence, and was committed for contempt; whereupon, at the application of the counsel for the Crown, the defendant objecting, the Judge discharged the jury from giving

any verdict. The Court refused to allow the defendant to add a plea puis darrein continuance, stating the above facts: on the ground that this would be to allow double pleading; and also, as the facts would be set out on the record, the defendant could take advantage of them. *The Queen v. Charlesworth*, 460.

EMANCIPATION.

See *Removeability*.

EQUITABLE GROUNDS, REPLICATION ON.

Declaration for goods bargained and sold, and goods bargained, sold and delivered. Plea, infancy. Replication on equitable grounds, that the defendant, at the time of the accruing of the causes of action with knowledge of his true age, falsely and fraudulently represented to the plaintiff that he, the defendant was of full age, whereby the plaintiff was induced to enter into the contract and supply the goods. On demurrer, held

1. That the replication was no answer to the plea either at law, or as an equitable replication, under sect. 85 of The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125.

2. That it was a departure from the declaration. *Bartlett v. Wells*, 836.

EVIDENCE.

I. In an action against a railway Company to recover a piece of superfluous land which the Company were bound to dispose of within ten years after it had been acquired by them, the plaintiff proposed to shew that, thirteen years after that time, the Company put the land up for sale by public auction as superfluous land. In order to prove this, the auctioneer was called as a witness, who deposed that he had received his instructions for the sale from one of the directors of the Company, and also from a person who had acted as their solicitor on former sales of land; held that this was not even *primâ facie* proof that

the sale was by the authority of the Company; although more than twelve months had elapsed between the sale and the trial. *Moody v. The London, Brighton and South Coast Railway Company*, 290.

II. The grounds of removal of a female pauper stated a derivative settlement from her great-grandfather; and alleged an acknowledgment of that settlement by relief given to her great-grandmother, and by a collateral relation having been removed to the parish. On the trial of an appeal at the Quarter Sessions against the order of removal, the respondents offered evidence to shew the removal to the appellant parish of another collateral relation—the wife of a grandson of the common ancestor—on a settlement also derived from him. This evidence was objected to, but received, and the question of its admissibility was reserved for this Court: held

Per *Hill and Crompton JJ.*, dubitante *Cockburn C. J.*, that the evidence was receivable. *The Queen v. The Inhabitants of Ruyton*, 534.

III. On an appeal against an order of removal of a female pauper, it was shewn that the father of the pauper's husband had occupied and paid rent for a tenement in the appellant parish. In order to prove the amount of that rent, the respondents' counsel offered to shew that, whilst in occupation of that tenement, the father said to his son that he occupied the same as tenant at an annual rent of 20*l.*: held, that the evidence was admissible. *The Queen v. The Overseers of Birmingham*, 763.

IV. Scintilla of.

Per *Crompton J.* The doctrine that if there is only a scintilla of evidence for the jury the verdict of the jury is not to be disturbed, is now exploded. *Mellors v. Shaw and Unwin*, 437.

EXECUTOR.

Where a person is assessed to the poor rate in respect of his own pro-

EXTINGUISHMENT OF DEBT.

erty, and is also executor of a person whose executors are assessed in respect of property of the deceased, he is entitled to vote at a vestry, under 58 *G. 3. c. 69.*, if the two assessments make up the required amount. *The Queen v. Kirby*, 647.

EXTINGUISHMENT OF DEBT.

See *Debt*.

FACTOR.

I. The Factors' Acts, 6 *G. 4. c. 94.* and 5 & 6 *Vict. c. 39.*, do not apply to the case of master and servant. *Lamb v. Attenborough*, 831.

II. Where a wine merchant gave authority to his clerk to sign delivery orders in his master's name, and receive dock warrants in his own, which he likewise authorized him to pledge for the purposes of the master's business, the clerk having fraudulently deposited some of these dock warrants with a pawnbroker as a security for money *bonâ fide* lent to him: held, that the clerk was not an agent within the Factors' Acts, 6 *G. 4. c. 94.* and 5 & 6 *Vict. c. 39.*, and, consequently, that the merchant was entitled to recover the dock warrants from the pawnbroker. *Id.*

FRAUD.

See *Pleading, Equitable*.

FRAUDS.

Statute of. See *Statute of Frauds*.

FRIENDLY SOCIETY.

Rule 16 of a friendly society provided, that a dispute of any kind whatsoever arising under the rules should be referred to a committee. By rule 22, any member in the receipt of the gifts of the Society being found imposing on the Society was to be expelled. A member of the Society in the receipt of pay was charged

with receiving full pay when he was only entitled to half pay, and, the matter being referred to a committee under rule 16, he was expelled, but without being heard before the committee. Upon application for a mandamus to reinstate him as a member of the Society,

1. Held, by *Crompton, Blackburn and Mellor JJ.*, *Cockburn C. J.* dubitante, that the County Court had jurisdiction, under stat. 18 & 19 *Vict. c. 63. ss. 41, 42*, to order him to be reinstated, if he had been improperly expelled.

2. *Quære*, whether this was a dispute within rule 16; but, if it was, held that the County Court might order the Society to hear the applicant. *Ex parte Wooldridge*, 844.

GAME.

I. An indictment, under stat. 9 *G. 4. c. 69.*, alleged that the defendant, on &c., was duly convicted before &c., three justices of the peace, for that he, in the night of 18th *December 1854*, by night, after the expiration of the first hour after sunset, and before the beginning of the first hour before sunrise, did by night then and there unlawfully enter a certain close &c. with a gun, for the purpose of then and there taking and destroying game, contrary to the statute &c., and was adjudged for the said offence, the same being his first offence, &c. That the defendant afterwards, to wit &c., was duly convicted before &c., two justices of the peace &c., for that he, in the night of 24th *November 1858*, by night, unlawfully did enter and be in and upon certain enclosed land &c., with certain instruments, for the purpose of killing, taking and destroying game thereon, this being his second offence, contrary to the form &c., and was adjudged for his said offence, &c. That the defendant, after he had been so twice convicted as aforesaid, to wit 25th *November 1860*, by night, did unlawfully enter and be in and upon certain enclosed land for the purpose, by night, as aforesaid, of therein taking and destroying game, and was then and there

by night unlawfully in the said land, with a certain gun and other instruments, for the purpose, by night as aforesaid, of therein taking and destroying game, against the form of the statute &c.: Held, that this indictment was good, seeing that it did not profess to set out the prior convictions "in hæc verba." *Cureton v. The Queen (in error)*, 208.

II. *Quære*, whether it was not good at all events? *Id.*

III. A conviction, under stat. 9 *G. 4. c. 69.*, alleging that the defendant, by night, after the expiration of the first hour after sunset, and before the beginning of the first hour before sunrise, did, by night, then and there unlawfully enter a certain close &c., with a gun, for the purpose of then and there taking and destroying game, contrary to the statute &c., is good. *Id.*

IV. *Quære*, per *Cockburn C. J.* and *Hill J.*, as to the decision in *Fletcher v. Calthrop*, 6 *Q. B.* 880? *Id.*

GARNISHEE.

H. recovered judgment in an action against *S.*, and issued a writ of *fi. fa.*, under which *S.*'s goods were seized. On an interpleader issue between *H.* and *M.*, who claimed the goods of *S.* which were so seized, *M.* had a verdict, and obtained an order for his costs, which were taxed. *H.* issued a writ of *ca. sa.* against *S.*, who was arrested. *M.* obtained a Judge's order, under sect. 61 of The Common Law Procedure Act, 1854, 17 & 18 *Vict. c. 125.*, to attach the debt due from *S.* to *H.*; and the amount was allowed in account between *M.* and *H.* *S.* having obtained an order to be discharged out of custody in the action of *H. v. S.*: Held, that *M.* was a judgment creditor of *H.* within the meaning of sect. 61: and that the arrest of *S.*, the garnishee, did not extinguish his debt to *H.*, or bar *M.*'s right to attach it under that section. *Hartley v. Shemwell. Marples v. Hartley*, 1.

W. 3. c. 2. s. 3., which enacts that no pardon under the Great Seal shall be pleadable in bar to an impeachment by the Commons in Parliament, renders a pardon under the Great Seal wholly inoperative to prevent impeachment by the House of Commons, and so get rid of the judgment of the House of Lords; for that purpose a *subsequent* pardon must be granted by the Crown: per *Cockburn C. J.*, *Crompton* and *Hill J.J.*; dubitante *Blackburn J.* *The Queen v. Boyes*, 311.

II. On the trial of an information for bribery, filed by *The Attorney General* by the direction of the House of Commons, one of the persons charged in the information to have been bribed by the defendant was called as a witness; and, on his declining to answer any questions with respect to the alleged bribery, the counsel for the Crown handed him a pardon under the Great Seal; which the witness accepted, but still declined to answer: held, that the possible risk of impeachment by the House of Commons, notwithstanding the pardon under the Great Seal, according to the Act of Settlement, 12 & 13 *W. 3. c. 2. s. 3.*, was not a sufficient ground to entitle him to the privilege of not answering. *Id.*

INCLOSURE ACT.

See *Mine*.

INCORPORATED JOINT STOCK COMPANY (LIMITED.)

See *Company, Incorporated Joint Stock (limited)*.

INFANCY.

Declaration for goods bargained and sold, and goods bargained, sold and delivered. Plea, infancy. Replication on equitable grounds, that the defendant, at the time of the accruing of the causes of action, with knowledge of his true age, falsely and fraudulently represented to the plaintiff

INJURY TO PERSON, &c.

that he, the defendant, was of full age, whereby the plaintiff was induced to enter into the contract and supply the goods. On demurrer, held that the replication was no answer to the plea either at law, or as an equitable replication under sect. 85 of The Common Law Procedure Act, 1854, 17 & 18 *Vict. c. 125.* *Bartlett v. Wells*, 836.

INJURY TO PERSON VOLUNTEERING ASSISTANCE.

While the defendant's porters were lowering bales of cotton from the defendant's warehouse, and his carter was receiving them into his lorry, the plaintiff, who was waiting with a lorry to receive a load of cotton for his master, at the request of the defendant's carter assisted him, and, in consequence of the negligence of the defendant's porters, a bale of cotton fell upon and injured him. There was no negligence or want of reasonable care on the part of the plaintiff or of the defendant's carter. Held, that the defendant was not liable to an action. *Potter v. Faulkner*, 800.

INSOLVENT.

I. If a bill of exchange be substantially described in the schedule of a party who has taken the benefit of the Insolvent Debtors' Act, 1 & 2 *Vict. c. 110.*, an unintentional mistake in the description, either of the bill or of the parties to it, will not prejudice the insolvent. *Romellio v. Halaghan*, 279.

II. A bill of exchange for 45*l.*, dated 30th *October* 1858, had been drawn by an insolvent upon, and accepted by, A., but in his schedule the insolvent described the bill as drawn by A. and accepted by himself, and dated about *November* 1858. The insolvent being afterwards sued on this bill, pleaded his discharge under the Act, when the jury having found upon the evidence that the misdescription was by mistake: held, that the defendant was entitled to the verdict. *Id.*

III. *Semble*, per *Crompton J.* If an insolvent knows that a bill of exchange on which he is liable has been indorsed over to some person unknown, it is better for him to say so in his schedule. *Id.*

IV. In an action on a bill of exchange drawn and accepted in *England*, and also for money lent, interest, and on accounts stated in *England*, the defendant pleaded a discharge under the insolvent law of the colony of *Victoria*, not alleging that either the plaintiff or the defendant was domiciled in that colony: held, no answer to the action. *Bartley v. Hodges*, 375.

V. Under the Insolvent Debtors' Act, 1 & 2 *Vict. c. 110.*, it is not a condition on the non-vesting in the assignees of privileged articles of the insolvent not exceeding the value of 20*l.*, that those articles be specified by him in his schedule. *Willmer v. Jacklin*, 641.

VI. *Quære*, when the value of such articles exceeds 20*l.*? *Id.*

INSURANCE.

I. A policy of life insurance may be the subject of a *donatio mortis causâ*. *Witt, administrator, v. Amis*, 109.

II. *A.*, as agent for a foreign owner, entered into a policy of insurance on a ship in the usual form. At the time of effecting the insurance, *A.* was in possession of a letter from the captain, informing him that the ship had received injury, which fact he, without fraudulent intention to deceive, omitted to disclose to the underwriters. The ship was lost, and *B.*, one of the underwriters, paid to *A.* his amount of the insurance; but, having subsequently become acquainted with the above circumstance, brought an action for money had and received against him to recover it back. *A.*, before he was aware of *B.*'s intention to dispute the policy, and acting *bonâ fide* throughout, transmitted to his principal the money he had received from

the various underwriters; with the exception of a certain amount for which he had allowed the principal credit in a settled account, and of another which, with the authority of the principal, he had expended in a suit brought by him on behalf of the principal against *C.*, another underwriter on the policy: held,

1. That, in consequence of the concealment from the underwriters of the fact stated in the captain's letter, the policy was voidable at the election of the underwriters.

2. That *A.*, being only an agent, of which *B.* was aware, and having, without notice of *B.*'s intention to repudiate the contract, paid over to his principal the amount received from the underwriters, *B.* was not entitled to recover back from *A.* his amount of the insurance.

3. That there was no difference in this respect between the money actually paid over by *A.* to his principal, and the moneys which had either been allowed in account between them or expended in the suit against *C.*

4. *Quære*, whether *B.* would have been entitled to recover, if he had not known that *A.* was acting merely as agent? *Holland v. Russell*, 424.

III. 1. A policy of insurance was entered into with a Company against bodily injury from any railway accident directly affecting the assured while travelling on any line of railway in *Great Britain* or *Ireland* by a passengers train propelled by steam power. One of the conditions in the deed of settlement of the Company, which by the terms of the policy was incorporated with it, provided that, before payment of the sum insured by any policy, proof satisfactory to the directors of the Company should be furnished by the claimant of the death or accident, together with such further evidence or information, if any, as the directors should think necessary to establish the claim: held, that this must be understood to mean such evidence or information as the directors might reasonably, and not such as they might unreasonably and capriciously require. *Braunstein v.*

The Accidental Death Insurance Company, 782.

IV. On a policy of insurance, entered into with a Company, against bodily injury from any railway accident directly affecting the assured while travelling on any line of railway in *Great Britain* or *Ireland* by a passengers train, propelled by steam power, there was indorsed a condition, that, in case of difference of opinion as to the amount of compensation payable in any case, the question should be referred to the arbitration of a person to be named by the secretary for the time being of the Master of the Rolls, and all expences and costs should be subject to the decision of such arbitrator, and the award made on such arbitration was to be taken as a final settlement of the question, and might made a rule of Court: held, that a reference to arbitration in the manner prescribed was rendered a condition precedent to bringing an action for an injury within the policy. *Id.*

ISSUE OF BODY.

See *Devise*.

JUDGMENT.

See *Action on*.

JURISDICTION.

I. The mother of a bastard child applied to a justice, within twelve months after the child's birth, for a summons against *P.*, the alleged father. The summons was issued by the justice, but could not be served, *P.* having absented himself. On *P.*'s return, which was more than twelve months after the child's birth, and before which time the justice who had issued the first summons had died, the mother obtained from another justice a second summons against *P.*; and, upon its coming on for hearing, the justices in petty session made an order adjudging *P.* to be the putative father, and ordering him to pay a certain sum by way of maintenance. Held, that

the order was bad, inasmuch as, by stat. 7 & 8 *Vict. c. 101. s. 2.*, the jurisdiction to make the order is limited to the justice before whom the first application is made; and that the second summons, not being issued by the same justice, could not be considered as part of the original process upon the first application. *The Queen v. Pickford*, 77.

II. The Court of Queen's Bench has no jurisdiction over tribunals out of the realm of *England*, although in countries subject to the *British Crown*. *In re Mansergh*, 400.

III. Where the civil rights of a person in military service are affected by the judgment of a military tribunal, in which that tribunal has acted without jurisdiction, or has exceeded its jurisdiction, this Court will interfere; aliter where nothing but the military status of the party is affected by the judgment. *Id.*

IV. A Captain in the Queen's service, when stationed with his regiment in *India*, was gazetted to a majority; and the appointment was notified in the general orders of the Commander-in-chief in *India* at head quarters, and in the regimental orders. Subsequently, the Captain having written to the Colonel of that regiment an insubordinate letter, was tried by court martial in *India*, was dismissed the service, and the proceedings of the court martial transmitted to the Judge Advocate General in *London*: three years afterwards, application being made to this Court for a certiorari to bring up the judgment of the court martial, in order that it might be quashed, the Court refused to interfere. *Id.*

JURY, DISCHARGE OF, WITHOUT GIVING VERDICT.

Where, in a case of misdemeanor, the jury are improperly, and against the will of the defendant, discharged by the Judge from giving a verdict after the trial has begun, this is not equivalent to an acquittal, nor does

it entitle the defendant to judgment quod eat sine die. *The Queen v. Charlesworth*, 460.

JUSTICE OF THE PEACE.

Certificate by.

Where, under 9 G. 4. c. 31. ss. 27—29., a complaint of assault or battery has been made to two justices of the peace, who dismiss the complaint and give the party a certificate accordingly, the certificate may be pleaded in bar to an indictment, founded on the same facts, charging assault and battery, accompanied by malicious cutting and wounding so as to cause grievous or actual bodily harm. *The Queen, on the prosecution of E. H. Finney, v. Elrington and another*, 688.

Conviction by. See *Naval Stores*.

Action against. See *Church Rate*.

LANDS CLAUSES CONSOLIDATION ACT.

By The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18. s. 124., if, after the promoters of the undertaking have entered upon lands which they are authorized to purchase, and which are permanently required, any party shall appear to be entitled to any interest in or charge thereon which through mistake was not purchased, then the promoters shall remain in undisturbed possession; provided within six months after notice of the interest or charge, in case the same is not disputed, or, in case the same shall be disputed, then, within six months after the right thereto shall have been established by law, they pay the compensation therein mentioned. The defendants, a railway Company, under their Act, which incorporated The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18., in July, 1858, entered upon lands of which the mortgagor had been in possession; and although the purchase money was not paid to him, the parties were treating for arrangement, and the entry was with the knowledge and consent of the mortgagor. The plain-

VOL. I.

3 U

tiff was mortgagee in fee of these lands, but the mortgage was not known by the defendants to exist until the plaintiff's attorney, having discovered the entry by the defendants, sent a letter in August, 1859, to the defendants' attorney, asserting the plaintiff's rights. A correspondence ensued, in which the plaintiff gave no information of his title and the defendants did not dispute his title, but asked for a short delay while their legal advisers were absent from London. In the following October the plaintiff brought ejectment. Held, by the Court of Queen's Bench, on the authority of *The Marquis of Salisbury v. The Great Northern Railway Company*, 5 C. B. N. S. 174, that the plaintiff might bring ejectment to establish his title, though execution upon the judgment would be stayed for six months. Held, by the Exchequer Chamber (reversing the judgment of the Queen's Bench), that ejectment could not be maintained, inasmuch as, the title not being in dispute, the above enactment gave the defendants a right of possession for six months after notice of the plaintiff's claim. *Jolly v. The Wimbledon and Dorking Railway Company*, 807.

LEASE.

By agreement, not under seal, plaintiff agreed to let, and defendant to hire, certain premises for seven years; and it was further agreed that a good and sufficient lease, embodying the terms of the agreement, should be prepared, at the joint expence of the parties. In an action for not accepting a lease: held that, though the instrument was void as a lease by stat. 8 & 9 Vict. c. 106. s. 3., it was good as an agreement. *Bond v. Rosling*, 371.

LETTER OF ALLOTMENT.

See *Company*.

LICENCE.

See *Alehouse Licence*.

B. & S.

LIMITATIONS, STATUTE OF.

On the day of the expiration of a writ of summons issued under The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76.), the plaintiffs' attorney attended at the office for the purpose of having it renewed, and paid the fee; but being suddenly called away omitted to get the seal impressed in pursuance of sect. 11, and did not discover the mistake until it was too late to keep the writ alive by resealing, so as to save the Statute of Limitations: held, that the Court had no power to direct the officer to impress the seal on the writ as of the day when the attorney applied to have it renewed; but that it would have been otherwise if the omission to reseat the writ had been occasioned by a fault of the officer of the Court. *Nazer and others v. Wade and another*, 728.

LOCAL AND PERSONAL ACT.

The defendant was agent for *B.*, the non-resident owner of houses in a district subject to a local Act. Works had been done by the Commissioners for executing the Act, the expenses of which, under the provisions of the Act, they charged on the owners of the adjoining houses. Notice had been given to the defendant as if he had been owner of these houses, calling on him to pay the proportion chargeable in respect of them. He attended at a meeting of the Commissioners, and objected both to the amount and nature of the charge, and also stated that he was not the owner of the houses, and that *B.* was. He was told that, if he did not pay, legal proceedings would be taken against him. In the result, the amount charged upon the defendant was reduced, and time was given to him to pay it in three instalments, for which he gave three promissory notes. In an action upon the notes by the Commissioners, held that there was a sufficient consideration for the notes in the compromise. *Cook and others v. Wright*, 559.

See also *General Issues*.

LOCAL GOVERNMENT ACT,
1858.

I. Sect. 55 of the Local Government Act, 1858 (21 & 22 Vict. c. 98.) which provides that the general district rates under the Act shall be levied "upon the occupier of all such kinds of property as by the laws in force for the time being are or may be assessable to any rate for the relief of the poor," has reference to the description of the property, not to the character of its occupation in the particular instance; and makes assessable to the district rates all property which, from its nature, is *prima facie* assessable to poor rate. *Guardians of Toxteth Park, appellants, v. The Local Board of Health of Toxteth Park, respondents*, 167.

II. *T.*, an extra parochial place maintaining its own poor, consisted of two districts: one within the borough of *L.*, the other "the rural" district, not within *L.* The guardians of *T.* built a workhouse and workhouse hospital within the rural district, which were used for the whole, and only for the whole of *T.* The Local Board of Health for the rural district having made a general district rate for that district; Held, that the guardians of *T.* were liable to assessment, as occupiers of property assessable for the relief of the poor, within the meaning of sect. 55 of stat. 21 & 22 Vict. c. 98. *Id.*

III. The ratepayers of a place not having a known or defined boundary petitioned the Secretary of State for the Home department, under sect. 16 of The Local Government Act, 1858, 21 & 22 Vict. c. 98., to settle its boundary, for the purposes of the Act: the petition stating the proposed boundaries. The Secretary of State appointed an inspector to inquire, and the inspector reported in favour of the proposed boundaries, subject to certain alterations by which certain properties beyond the proposed boundaries were included in the district. On the 15th

of *January*, 1861, the Secretary of State made an order adopting the proposed boundaries with the alterations, and directed that from and after that date the boundaries therein set forth should form the boundaries of the district. In pursuance of the order, a meeting of the ratepayers, to decide as to the adoption of the Act within the district, was held on the 16th *February*, at which a resolution for its adoption was carried. On the 7th *March*, *S.*, a ratepayer who occupied property in the district, appealed against this resolution to the Secretary of State, upon the ground that his property was not comprised within the boundary from within which the petition proceeded. The Secretary of State again directed the inspector to inquire, and upon his report thereon made an order, dated the 21st of *April*, dismissing the appeal, and directing that, after one month from the date thereof, The Local Government Act, 1858, should have the force of law within the district. Upon motion for a certiorari at the instance of *S.* to remove the order of the 15th of *January*, on the ground that it was ultra vires of the Secretary of State to make it :

1. Held; by *Wightman* and *Blackburn JJ.*, *Cockburn*, C. J. dubitante; that if the Secretary of State had exceeded the powers conferred upon him by the Act, still the application for a certiorari was too late, the resolution for the adoption of the Act having, by sect. 20, acquired the force of law within the district.

2. *Quære*, whether the Secretary of State, under sect. 16, has power to alter the boundaries proposed in the petition so as to extend or diminish the area of the district? *Ex parte Smith*, 412.

LUNATIC.

See *Pauper Lunatic*.

LUNATIC ASYLUMS ACT.

See *Quarter Sessions, Case reserved by.*

3 u 2

MAINS.

See *Towns Improvement Clauses Act*.

MALICE.

See *Church Rate*.

MANDAMUS.

I. *Quære* whether, under any circumstances a mandamus lies to compel a party to institute legal proceedings against another? *The Queen, on the prosecution of The Mayor, Aldermen and Burgesses of Southampton, v. The Commissioners of the Port of Southampton*, 5.

II. A duty having been imposed upon a party by statute to levy certain moneys from other parties, and pay over to another a portion of the sums levied: a mandamus was issued directing him "to take the necessary and legal measures and proceedings, for obtaining and recovering payment:" Held, per *Crompton* and *Blackburn JJ.* (*Cockburn* C. J. dissentiente), that the words "legal measures" did not necessarily mean the instituting legal proceedings. *Id.*

III. Semble that a mandamus may be issued against a party for a matter in respect of which he is liable to an action or to a suit in equity. *Id.*

IV. The mandatory part of a writ of mandamus may be very general; but the return must be very minute in shewing why the party did not do what he was commanded: per *Crompton* and *Blackburn JJ.*

V. The Metropolitan Local Management Act, 18 & 19 *Vict. c. 120. s. 69.*, enacts that the vestry of every parish mentioned in Schedule A. shall make such sewers as may be necessary for effectually draining their parish: provided that no new sewer shall be made without the previous approval of the Metropolitan Board of Works. Mandamus to the vestry of one of these

parishes, commanded them to make such sewers as might be necessary for draining a particular part of the parish, and to take all necessary steps in that behalf: held defective: first, because it did not shew a present duty to make the sewers: secondly, because it ordered the defendants to make them without shewing that the approval of the Metropolitan Board had been obtained. *The Queen v. The Vestry of St. Luke's, Chelsea*, 903.

VI. When a special case is stated for the opinion of the Court, and the parties agree that, in the event of the Court giving judgment for the plaintiff, a mandamus may issue against the defendant: Held, by the Exchequer Chamber, that this must be understood to mean if the Court thinks fit that it shall do so. *Nicholl and others v. Allen*, 916.

VII. So if the agreement had been that a mandamus shall issue: dubitante *Willes J.* *Id.*

MARINE INSURANCE.

I. Where goods are insured by a policy of marine insurance in the ordinary form, the expression "warranted free from particular average" is not confined to losses arising from injury to, or deterioration of the goods themselves; but is equivalent to a stipulation against total loss and general average only; and, consequently, includes expences incurred in relation to the goods. *Great Indian Peninsular Railway Company v. Saunders*, 41.

2. A quantity of iron rails was shipped to be carried to a certain place, for a sum to be paid here, ship lost or not lost. The shippers insured them by a policy in the ordinary form "warranted free from particular average, unless the ship be stranded, sunk or burnt." The ship was neither sunk, stranded, nor burnt, but there was a constructive total loss of her by perils of the sea. The rails were saved, and sent on in other vessels to their destination, for which the insured was compelled to pay freight to an amount not exceeding the value of the

rails. Held, that this freight was not recoverable under the policy. *Id.*

3. Quære, whether an underwriter on a policy against total loss only, with the usual clause authorising the assured to sue and labour for the preservation of the subject matter of the insurance, is liable for expences incurred by the assured for the purpose of securing the subject matter of the insurance from a state of peril, which might have resulted in a total loss, but did not? *Id.*

II. A person possessed of a share in *The Atlantic Telegraph Company*, established for the purpose of laying down a submarine electric cable between the United Kingdom and *America*, insured the same by a policy in the ordinary form of a policy of marine insurance. The insurance was expressed to be "at and from the United Kingdom, say from *London*, and wheresoever the risk may commence, to the *Atlantic Ocean*, and at and thence, by or in one or more ship or ships, or steamer or steamers, to the place or places of destination, both in the United Kingdom ^{and} _{or} the Continent, island or peninsular of *America*, ^{and} _{or} the *British* or other possessions of *America*, including and containing all and every accident, danger and risk that may be incurred at sea or on land in all or any boats, ships and craft whatsoever and wheresoever, until the final, complete and successful laying down of the *Atlantic Telegraph* cable, from shore to shore." The usual blank for the name of the ship was filled up thus: any ship or ships, or steamer or steamers, or craft as above;" and in the valuation clause the subject of insurance was to be taken as "on one 1000*l.* share in *The Atlantic Telegraph Company*, said share valued at 1100*l.* In case of loss the part saved to be sold or appraised for the benefit of the underwriters. The insurance contained the common memorandum, with the addition of a special agreement, in a memorandum annexed to the policy, that the insurance should "cover and include the successful working of the cable when laid down." An electric

cable extending from the *Irish* to the *North American* coast was finally laid down after a previous abortive attempt, during which a portion of it was lost by perils of the seas; and on the second attempt, during which more cable was lost, a quantity of superfluous cable was taken out to meet contingencies. It was, however, found impossible to maintain electrical communication, sufficient for telegraphic purposes, and the telegraph was abandoned. The cause of the failure was the imperfect insulation of the copper wire along which the electric fluid passed, arising from defect in the outer covering by which it was protected from external contact; which defect was occasioned by accident prior to the shipment of the cable and the commencement of the risk, aggravated by the action of the sea, and arose from the *chemical* action of the sea water on the interior of the cable, and not from any mischief done by the *mechanical* action of the sea: held,

1. That this was not an injury caused by "perils of the seas."

2. In an action on the policy with respect to the portion of the cable lost by perils of the seas: held, that the plaintiff was entitled to recover as for a partial loss.

3. In the same case: held also that the warranty against partial average was applicable, and consequently that the plaintiff could not recover unless a loss of 3 $\frac{1}{2}$ per cent. had been sustained.

4. Held also, in the same case, that in assessing the damages the value of the whole cable that ever was exposed to peril, including the portion lost, must be ascertained according to its cost, when shipped free on board; and that the proportion between that value and the loss actually incurred by the perils insured against would give the per centage payable by each underwriter on his subscription.

5. Held also that, in applying the above principle, that portion of the cable which was lost in the first attempt to lay down the cable, and which it became necessary to replace by new cable, should be estimated at the cost

of the substituted cable; but that as regarded that portion of the lost cable which was taken out as superfluous cable, by way of a provision against accident, it might be reasonable to consider how far such cable, if not lost, would have been depreciated in marketable value by having been coiled in the hold of a vessel or by other circumstances. *Paterson v. Harris*, 336.

MARRIAGE.

I. The marriage of a man with the daughter of the half sister of his deceased wife is null and void by stat. 5 & 6 W. 4. c. 54. *The Queen v. The Inhabitants of Brighton*, 447.

II. A marriage within the prohibited degrees of consanguinity or affinity is null and void, although one of the parties is illegitimate. *Id.*

MASTER AND SERVANT.

I. Declaration stated that defendants were owners of a coal mine, and plaintiff was employed by defendants as a collier in the mine, and in the course of his employment it was necessary for him to descend and ascend through a shaft constructed by defendants; that by the negligence of defendants the shaft was constructed unsafely, and was, by reason of not being sufficiently lined or cased, in an unsafe condition, which defendants well knew: and by reason of the premises, and also by reason, as defendants well knew, of no sufficient or proper apparatus having been provided by defendants to protect plaintiff from injuries arising from the unsafe state of the shaft, a stone fell from the side of the shaft on the head of the plaintiff, and he was dangerously wounded. Plea, not guilty. At the trial it was proved that S., one of the two defendants, was manager of the mine, and that it was worked under his personal superintendence; and that the plaintiff was not aware of the state of the shaft. The jury found that the defendants were guilty of personal negligence. Held,

1. On motion to enter a nonsuit, that on this finding of the jury *S.* was liable, and therefore the other defendant was liable also.

2. On motion in arrest of judgment that the declaration must be taken to allege personal knowledge in the defendants of the state of the shaft, and therefore the action was maintainable. *Mellors v. Shaw*, 437.

II. While the defendant's porters were lowering bales of cotton from the defendant's warehouse, and his carter was receiving them into his lorry, the plaintiff, who was waiting with a lorry to receive a load of cotton for his master, at the request of the defendant's carter assisted him, and in consequence of the negligence of the defendant's porters, a bale of cotton fell upon and injured him. There was no negligence or want of reasonable care on the part of the plaintiff or of the defendant's carter. Held, that the defendant was not liable to an action. *Potter v. Faulkner*, 800.

III. The Factors' Acts, 6 *G. 4. c. 94.* and 5 & 6 *Vict. c. 39.*, do not apply to the case of master and servant. *Lamb v. Attenborough*, 831.

MATERIAL FACT.

Concealment of. See *Insurance*, II.

MEMORANDA.

Trinity Vacation 1861, 640.

Michaelmas Term and Vacation 1861, 824.

MERCHANT'S CLERK.

See *Factor*, II.

MERCHANT SHIPPING ACT, 1854.

The Merchant Shipping Act, 1854, 17 & 18 *Vict. c. 104.*, enacts that "the certificate of registry shall be used only for the lawful navigation of the ship, and shall not be subject to de-

METROPOLIS &c. ACT.

tention by reason of any title, lien, charge, or interest whatsoever which any owner, mortgagee, or other person may have or claim to have on or in the ship described in such certificate: and if any person whatever" "refuses on request to deliver up such certificate when in his possession or under his controul to the person for the time being entitled to the custody thereof for the purposes of such lawful navigation," proceedings may be taken before a justice; "and unless it is proved" "that there was reasonable cause for such refusal, the offender shall incur a penalty not exceeding 100*l.*"; which, or any part of which, by sect. 524, the justice may, if he thinks fit, direct to be applied in compensating any person for damage sustained by him in consequence of the wrongful act.

Held, by the Court of Queen's Bench, and affirmed in the Exchequer Chamber, but with hesitation,

1. That the effect of sect. 50 is to make any pledge of the certificate, for any purpose whatever, though for a good consideration, illegal and void; and, consequently, any detainer of a certificate so pledged illegal.

2. That, where the person entitled to the custody of the certificate for the purposes of navigation is also the owner of the ship, he has a right of action against the party so detaining the certificate, in addition to his remedy, in the former character, by a complaint before a justice. And this, though he be himself the pledger, and for a good consideration.

3. *Quære*, by the Court of Queen's Bench, whether an action at law would lie, by the party merely entitled to the custody, for the detainer made unlawful by the penal part of the enactment, if it would, *seem* that the declaration should, in that case, aver absence of reasonable cause. *Wiley v. Crawford and Fenwick*, 253.

METROPOLIS LOCAL MANAGEMENT ACTS.

I. The parish of *St. John's, Southwark*, was, before and at the time of

the passing of The Metropolis Local Management Act, 1855, 18 & 19 Vict. c. 120., governed by local Acts, 26 G. 3. c. exiv. and 5 G. 4. c. lxxiv. Under these local Acts the vestry of the parish was to appoint, annually, a select vestry, which select vestry was to nominate, annually, "Governors and Directors of the poor of the said parish," who were to make rates for the relief of the poor of the said parish. Held, that the power to appoint the governors and directors was, since the passing of stat. 18 & 19 Vict. c. 120., transferred to the new vestry directed to be appointed by that Act, either under sects. 8, 90, of that Act, or under sect. 3 of the amending Act, 19 & 20 Vict. c. 112. *The Queen, on the prosecution of the Churchwardens &c. of St. John Southwark, resps., v. Rendle, appt., 54.*

II. The Metropolis Local Management Act, 18 & 19 Vict. c. 120., empowers the vestry or district board of the parish or district, if necessary, to convert an insufficient privy into a watercloset. *The Vestry of St. Luke's, Middlesex, appellants, v. Lewis, respondent, 865.*

III. In a parish included in Schedule A. to The Metropolis Local Management Act, 18 & 19 Vict. c. 120., the vestry, in consequence of complaints of the condition of two privies to four houses in a court, served upon the owner a notice to do certain works, which he complied with so far as to fix pans to the closets, but not in providing water supply. The surveyor to the vestry, after due notice to the owner, entered upon and inspected the premises, and opened the drains passing under the footway pavement and connecting the privies with the sewer, which were found to be choked and blocked up. These drains he cleansed and put in order at the expence of the vestry, which then served notice on the owner requiring him to find water supply to the closets, to which no attention having been paid, the vestry, after giving notice of their intention to do so, entered on the premises by their officers, and

fixed a cistern upon the roof of the privies, removing the roof and also three courses of brick work on the upper side or pitch thereof for the purpose of procuring a level base for the cistern; the roof was not replaced but the lower part of the cistern formed a new roof. They also fitted the necessary plumber's work for connecting the cistern with the pipes of the water company, and also the pipes connecting the cistern with the pans of the closets, and they also fixed new seats in the privies. When the officers entered on the premises to do the above work, the pans of both the privies were filled and choked up with filth, and the seats and floor were covered with filth in consequence of the want of water supply. Held that, under the Act, the vestry were entitled to do what they had done, and to recover the expenses from the owner of the houses. *Id.*

IV. The Metropolitan Local Management Act, 18 & 19 Vict. c. 120. s. 69., enacts, that the vestry of every parish mentioned in Schedule A. shall make such sewers as may be necessary for effectually draining their parish: provided that no new sewer shall be made without the previous approval of the Metropolitan Board of Works. Mandamus to the vestry of one of these parishes, commanded them to make such sewers as might be necessary for draining a particular part of the parish and to take all necessary steps in that behalf: held defective: first, because it did not shew a present duty to make the sewers; secondly, because it ordered the defendants to make them without shewing that the approval of the Metropolitan Board had been obtained. *The Queen v. The Vestry of Saint Luke's, Chelsea, 903.*

MILITARY.

Status.

Where the civil rights of a person in military service are affected by the judgment of a military tribunal, in which that tribunal has acted without jurisdiction, or has exceeded its juris-

diction, this Court will interfere; aliter, where nothing but the *military* status of the party is affected by the judgment. *In re Mansergh*, 400.

Tribunal.

I. Where the *civil* rights of a person in military service are affected by the judgment of a military tribunal, in which that tribunal has acted without jurisdiction, or has exceeded its jurisdiction, this Court will interfere: aliter where nothing but the *military* status of the party is affected by the judgment. *In re Mansergh*, 400.

II. A Captain in the Queen's service, when stationed with his regiment in *India*, was gazetted to a majority; and the appointment was notified in the general orders of the Commander-in-chief in *India* at head quarters, and in the regimental orders. Subsequently, the Captain having written to the Colonel of that regiment an insubordinate letter, was tried by court martial in *India*, was dismissed the service, and the proceedings of the court martial transmitted to the Judge Advocate General in *London*: three years afterwards, application being made to this Court for a certiorari to bring up the judgment of the court martial, in order that it might be quashed, the Court refused to interfere. *Id.*

MINE.

Declaration alleged that the plaintiff was lawfully possessed of lands, yet the defendants so wrongfully, carelessly, negligently and improperly, and without leaving any proper or sufficient support, worked mines under the land, that great parts of it fell in, whereby the plaintiff's interest in the land was deteriorated, and a mare of the plaintiff was killed. Third plea, as to working the mines without leaving any proper or sufficient support, that in the reign of *George* the Second an inclosure Act was passed, by which, after reciting that the lord of the manor of *W.* was seized of the soil of the commons, parcel of the manor, and of coal mines

under the same, and certain persons were entitled to the right of common in the commons, and being willing and desirous to improve their estates and properties, and that the said commons might be cultivated and improved, and rendered of some use and value had agreed, with the consent of the lord, that the same should be enclosed, allotted and divided amongst them, it was enacted that the commons should be set out, awarded and divided accordingly; and that the lord should hold and enjoy the mines under the commons so to be allotted and divided, together with all convenient and necessary ways, and liberty of laying ways over the same, and of searching for and working the mines, as fully as if the Act had not been passed, without making any satisfaction for so doing; and after reciting that damage might be done to persons by reason of the searching and working the mines by the lord under their allotments, it was enacted, that when any person should sustain damage in his allotment by the searching for and working of the mines therein, or the laying of ways therein, compensation to be assessed by one or more justices of the peace should be made to him, and borne by the occupiers of the allotments in the same township. That the commons were allotted and divided under the said Act, and the land of the plaintiff was parcel of the said commons. That from time immemorial up to the passing of the Act, the lord and his assigns had been used and accustomed as of right to search for, win and work the mines under the commons without leaving any support for the lands under which the mines were situate and without making any satisfaction for any injury caused by such working; and that from the time of passing the Act the mines had been so worked, without leaving any support; and that the defendants worked the mines under a lease thereof from the lord. On demurrer, held, that the plea was bad, such a prescription having been held void, as unreasonable, in *Hilton v. Earl Granville*, 5 Q. B. 701.

Fourth plea, as to working the mines without leaving proper and

sufficient support, that the lord of the manor of *W.* was seised in fee of the mines within the manor, and that, for forty years next before the commencement of action, the lord and his tenants had been used and accustomed of right to work the mines without leaving any support for the lands under which the mines were situate, and justifying the working of the mines as tenants to the lord in the exercise of the said right and custom. The fifth plea was similar, alleging the custom for twenty years. On demurrer, held that these pleas were bad as they did not shew any acts done on the plaintiff's land; and acts done on the land of another, although done as of right for twenty or forty years, could not affect the plaintiff's rights. *Blackett v. Bradley and others*, 940.

MISDESCRIPTION IN SCHEDULE.

I. If a bill of exchange be substantially described in the schedule of a party who has taken the benefit of the Insolvent Debtors' Act, 1 & 2 Vict. c. 110., an unintentional mistake in the description, either of the bill or of the parties to it, will not prejudice the insolvent. *Romello v. Hallaghan*, 279.

II. A bill of exchange for 45*l.*, dated 30th October 1858, had been drawn by an insolvent upon, and accepted by, *A.*, but in his schedule the insolvent described the bill as drawn by *A.* and accepted by himself, and dated about November 1858. The insolvent being afterwards sued on this bill, pleaded his discharge under the Act, when the jury having found upon the evidence that the misdirection was by mistake: held, that the defendant was entitled to the verdict. *Id.*

III. *Seemle*, per *Crompton J.* If an insolvent knows that a bill of exchange on which he is liable has been indorsed over to some person unknown, it is better for him to say so in his schedule. *Id.*

MISJOINDER.

A declaration alleged that *A.*, ad-

ministrator of *B.* and *C.*, sued *D.* for money payable by him to *A.* as administrator, and *C.*; for money paid by *C.* and *B.* in his lifetime &c.; and for money paid by *A.*, administrator &c., and *C.*; and for money lent by *C.* and *B.* in his lifetime; and for money lent by *A.*, administrator &c., and *C.*; and on accounts stated between the defendant and *A.*, administrator &c., and *C.* To this declaration the defendant demurred. Held,

1. That the declaration was bad for misjoinder.

2. That the defect was not cured by The Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126.) sect. 19. *Bellingham and another v. Clark*, 332.

MONEY HAD AND RECEIVED.

See *Bristol and Exeter Railway Company*, and *Insurance*, 11.

NAVAL STORES.

I. On a summary conviction, under stat. 39 & 40 G. 3. c. 89. s. 18., for unlawful possession of naval stores, the Commissioner (or Superintendent, since stat. 2 & 3 W. 4. c. 40. ss. 10, 11.), or justice of the peace, has power, in the alternative, either to inflict a fine or to imprison with hard labour without imposing a fine. *The Queen v. Willmott*, 27.

II. Quære whether, in the latter event, an appeal to the Quarter Sessions is given by sect. 22 of that statute? *Id.*

III. The pendency of an appeal under that section has not the effect of suspending the operation of the sentence. *Id.*

IV. Summary convictions under that statute are not affected by stat. 11 & 12 Vict. c. 43. *Id.*

NECESSITY, WAY OF.

See *Way*, III.—VII.

NEGLECTANCE.

I. Declaration stated that defendants were owners of a coal mine, and plaintiff was employed by the defendants as a collier in the mine, and in the course of his employment it was necessary for him to descend and ascend through a shaft constructed by defendants: that by the negligence of defendants the shaft was constructed unsafely, and was, by reason of not being sufficiently lined or cased, in an unsafe condition, which defendants well knew: and by reason of the premises, and also by reason, as defendants well knew, of no sufficient or proper apparatus having been provided by defendants to protect plaintiff from injuries arising from the unsafe state of the shaft, a stone fell from the side of the shaft on the head of the plaintiff, and he was dangerously wounded. Plea, not guilty. At the trial it was proved that *S.*, one of the two defendants, was manager of the mine, and that it was worked under his personal superintendence; and that the plaintiff was not aware of the state of the shaft. The jury found that the defendants were guilty of personal negligence. Held,

1. On motion to enter a nonsuit, that on this finding of the jury *S.* was liable, and therefore the other defendant was liable also.

2. On motion in arrest of judgment, that the declaration must be taken to allege personal knowledge in the defendants, of the state of the shaft, and therefore the action was maintainable. *Mellors v. Shaw and Unwin*, 437.

II. While the defendant's porters were lowering bales of cotton from the defendant's warehouse, and his carter was receiving them into his lorry, the plaintiff, who was waiting with a lorry to receive a load of cotton for his master, at the request of the defendant's carter assisted him, and, in consequence of the negligence of the defendant's porters, a bale of cotton fell upon and injured him. There was no negligence or want of reasonable

NOLLE PROSEQUI.

care on the part of the plaintiff or of the defendant's carter. Held, that the defendant was not liable to an action. *Potter v. Faulkner*, 800.

NOLLE PROSEQUI

I. The Attorney General has power to enter a nolle prosequi on an indictment without calling upon the prosecutor to shew cause why that should not be done; and where he has done so this Court will not interfere.

II. *Quære*, whether the nolle prosequi has the effect of putting an end to the prosecution altogether. *The Queen on the prosecution of Gregory v. Allen*, 850.

NON INFREGIT CONVENTIONEM.

See *General Issue*, I.

NOTICE OF CLAIM.

See *Lands Clauses Consolidation Act*.

OCCUPATION.

See *Beneficial Occupation*.

OMISSION TO STAMP.

See *Articles of Clerkship*.

PARDON UNDER GREAT SEAL.

I. A pardon under the Great Seal takes away the privilege of a witness in not answering so far as regards any risk of prosecution at the suit or in the name of the Crown. *The Queen v. Boyce*, 311.

II. The Act of Settlement, 12 & 13 W. 3. c. 2. s. 3., which enacts that no pardon under the Great Seal shall be pleadable in bar to an impeachment by the Commons in Parliament, renders a pardon under the Great Seal wholly inoperative to prevent impeachment by the House of Commons, and so getting rid of the judg-

ment of the House of Lords; for that purpose a *subsequent* pardon must be granted by the Crown: per *Cockburn C. J., Crompton and Hill JJ.*; dubitante *Blackburn J. Id.*

III. On the trial of an information for bribery, filed by *The Attorney General* by the direction of the House of Commons, one of the persons charged in the information to have been bribed by the defendant was called as a witness; and, on his declining to answer any questions with respect to the alleged bribery, the counsel for the Crown handed him a pardon under the Great Seal, which the witness accepted, but still declined to answer: held, that the possible risk of impeachment by the House of Commons notwithstanding the pardon under the Great Seal, according to the Act of Settlement, 12 & 13 W. 3. c. 2. s. 3., was not a sufficient ground to entitle him to the privilege of not answering. *Id.*

IV. On the trial of that information a witness who was called to prove the fact of his having received a bribe from the defendant, objected to give evidence on the ground that the effect of the evidence he was called upon to give would be to criminate himself. Thereupon the counsel for the Crown handed to the witness a pardon under the Great Seal, who accepted it. The witness, however, still objecting to give evidence, and the Judge entertaining doubts as to whether the witness could be properly compelled to answer, notwithstanding the pardon, an arrangement was come to between the counsel on both sides, with the sanction of the Judge, that the witness should be directed to answer, but that the opinion of this Court should be taken as to whether the privilege of the witness remained notwithstanding the pardon, the counsel for the Crown undertaking, in the event of this Court holding the affirmative, to enter a nolle prosequi, if the defendant should be convicted. The defendant having been convicted, this Court granted a rule to shew cause why a new trial should not be had; and,

having heard it argued, discharged it, protesting against the course pursued at the trial being drawn into a precedent—as the Court was thereby called on to pronounce a judgment which it was without authority to enforce. *Id.*

PARTIAL LOSS.

See *Marine Insurance.*

PARTICULAR AVERAGE.

See *Average.*

PARTNERS.

See *Master and Servant, I.*

PAUPER.

Settlement of.

The grounds of removal of a female pauper stated a derivative settlement from her great-grandfather; and alleged an acknowledgment of that settlement by relief given to her great-grandmother, and by a collateral relation having been removed to the parish. On the trial of an appeal at the Quarter Sessions against the order of removal, the respondents offered evidence to shew the removal to the appellant parish of another collateral relation—the wife of a grandson of the common ancestor—on a settlement also derived from him. This evidence was objected to, but received, and the question of its admissibility was reserved for this Court:

Held, that the Court of Quarter Sessions were prohibited by stat. 11 & 12 Vict. c. 81. from reserving the above question for the consideration of this Court.

Per *Hill and Crompton JJ.*, dubitante *Cockburn C. J.*, that the evidence was receivable. *The Queen v. The Inhabitants of Ruyton, 534.*

See also *Rate, Poor.*

Lunatic.

I. The expression "Union," in the 16 & 17 Vict. c. 97. s. 97., relative to the settlement and expences incurred

in respect of pauper lunatics, applies to a union formed under *Gilbert's Act* (22 G. 3. c. 83.) *The Queen v. The Inhabitants of Bramley*, 732.

II. A pauper lunatic had resided for more than five years in the respondent parish with her father and mother, when he died, and she continued to reside with her mother in that parish till *October* 1858, when she was sent to the workhouse, where she remained till the 24th *January* 1860. In *December*, 1859, her mother went to reside in another parish, but did not acquire any settlement in her own right. On the 24th *January*, 1860, the pauper lunatic was sent from the workhouse to the county lunatic asylum and was confined there until the 25th *April* following, when she was discharged and went to reside with her mother. Upon an appeal, against an order of adjudication and maintenance, under stat. 16 & 17 *Vict.* c. 97., upon the parish in which her father was settled: held that, the pauper lunatic being unemancipated continued part of her mother's family and therefore, her mother having ceased to be irremovable, she also ceased to be irremovable, and the order was rightly made. *The Queen v. The Churchwardens and Overseers of St. Mary Arches, Exeter*, 890.

PERILS OF THE SEA.

See *Marine Insurance*.

PIPES, RATING.

See *Towns Improvement Clauses Act*.

PLEADING.

I. The mandatory part of a writ of mandamus may be very general; but the return must be very minute in shewing why the party did not do what he was commanded: per *Crompton and Blackburn JJ.* *The Queen, on the prosecution of the Mayor &c. of Southampton, v. The Commissioners of the Port of Southampton*, 5.

II. The Metropolitan Local Management Act, 18 & 19 *Vict.* c. 120. s. 69., enacts, that the vestry of every parish mentioned in Schedule A. shall make such sewers as may be necessary for effectually draining their parish: provided that no new sewer shall be made without the previous approval of the Metropolitan Board of Works. Mandamus to the vestry of one of these parishes, commanded them to make such sewers as might be necessary for draining a particular part of the parish, and to take all necessary steps in that behalf: held defective: first, because it did not shew a present duty to make the sewers; secondly, because it ordered the defendants to make them without shewing that the approval of the Metropolitan Board had been obtained. *The Queen v. The Vestry of St. Luke's, Chelsea*, 903.

Equitable.

Declaration for goods bargained and sold, and goods bargained, sold and delivered. Plea, infancy. Replication on equitable grounds, that the defendant, at the time of the accruing of the causes of action, with knowledge of his true age, falsely and fraudulently represented to the plaintiff that he, the defendant, was of full age, whereby the plaintiff was induced to enter into the contract and supply the goods. On demurrer, held, that the replication was no answer to the plea either at law, or as an equitable replication under sect. 85 of The Common Law Procedure Act, 1854, 17 & 18 *Vict.* c. 125. *Burlett v. Wells*, 836.

Double.

See *Double Pleading*.

POLICE.

Stat. 15 & 16 *Vict.* c. 81. ss. 32. 34 and 35, which provides for the collection of the county rate in parishes situate partly within boroughs and partly without, applies only to boroughs "not subject to contribute to

POLICY OF INSURANCE.

the county rate;" and therefore, where a parish is situate partly within a borough which contributes to the county rate, a separate rate towards the expence of the county police cannot be made upon the part without the borough, though the part within it is governed by a local Act, under which police constables are appointed and paid. *The Queen v. The Overseers of Huddersfield*, 961.

POLICY OF INSURANCE.

See *Insurance*, I.

POOR.

See *Rate, Poor*; and *Pauper*.

PRACTICE AT TRIAL.

On the trial of an information for bribery at an election for members of Parliament for a borough, filed by the Attorney General by the direction of the House of Commons, a witness who was called to prove the fact of his having received a bribe from the defendant, objected to give evidence on the ground that the effect of the evidence he was called upon to give would be to criminate himself. Thereupon the counsel for the Crown handed to the witness a pardon under the Great Seal, who accepted it. The witness, however, still objecting to give evidence, and the Judge entertaining doubts as to whether the witness could be properly compelled to answer, notwithstanding the pardon, an arrangement was come to between the counsel on both sides, with the sanction of the Judge, that the witness should be directed to answer, but that the opinion of this Court should be taken as to whether the privilege of the witness remained, notwithstanding the pardon; the counsel for the Crown undertaking, in the event of this Court holding the affirmative, to enter a nolle prosequi, if the defendant should be convicted. The defendant having been convicted, this Court granted a rule to shew cause why a new trial should not be

PRESCRIPTION. 1005

had; and, having heard it argued, discharged it, protesting against the course pursued at the trial being drawn into a precedent—as the Court was thereby called on to pronounce a judgment which it was without authority to enforce. *The Queen v. Boyes*, 312.

PRESCRIPTION.

See *Mine*.

PRINCIPAL AND AGENT.

I. *A.*, professing to have authority from the owners of certain premises, granted a parol lease of them for seven years to *B.*, and let him into possession. The owners, disavowing the authority of *A.*, demanded possession of the premises from *B.*; and, on his refusal, brought an ejectment against him. *B.*, relying on a statement of *A.* that he had authority to act as he did, and that the ejectment would not be persevered in, and also on the advice of his own attorney, defended the ejectment, but unsuccessfully, and was turned out of possession. *B.* having brought an action against *A.* for this false assumption of authority, the jury found that *A.* had acted bonâ fide and without fraud, and through a misapprehension that he had authority. Held that *B.* was not entitled to recover as damages against *A.* the costs incurred in defending the ejectment. *Pow v. Davis*, 220.

II. *A.*, as agent for a foreign owner, entered into a policy of insurance on a ship in the usual form. At the time of effecting the insurance, *A.* was in possession of a letter from the captain, informing him that the ship had received injury, which fact he, without fraudulent intention to deceive, omitted to disclose to the underwriters. The ship was lost, and *B.*, one of the underwriters, paid to *A.* his amount of the insurance; but, having subsequently become acquainted with the above circumstance, brought an action for money

1006 PRIVILEGE OF WITNESS, &c.

had and received against him to recover it back. *A.*, before he was aware of *B.*'s intention to dispute the policy, and acting *bonâ fide* throughout, transmitted to his principal the money he had received from the various underwriters; with the exception of a certain amount for which he had allowed the principal credit in a settled account, and of another which, with the authority of the principal, he had expended in a suit brought by him on behalf of the principal against *C.*, another underwriter on the policy: held,

1. That, in consequence of the concealment from the underwriters of the fact stated in the captain's letter, the policy was voidable at the election of the underwriters.

2. That *A.* being only an agent, of which *B.* was aware, and having, without notice of *B.*'s intention to repudiate the contract, paid over to his principal the amount received from the underwriters, *B.* was not entitled to recover back from *A.* his amount of the insurance.

3. That there was no difference in this respect between the money actually paid over by *A.* to his principal, and the moneys which had either been allowed in account between them or expended in the suit against *C.*

4. *Quære*, whether *B.* would have been entitled to recover, if he had not known that *A.* was acting merely as agent. *Holland v. Russell*, 424.

PRIVILEGE OF WITNESS IN NOT ANSWERING.

See *Witness, Privilege of in not answering*.

PRIVILEGED ARTICLES.

I. Under the Insolvent Debtors Act, 1 & 2 *Vict.* c. 110., it is not a condition on the non-vesting in the assignees of privileged articles of the insolvent not exceeding the value of 20*l.*, that those articles be specified by him in his schedule.

II. *Quære*, when the value of such articles exceeds 20*l.*? *Willsmer v. Jacklin*, 641.

PROHIBITED DEGREES.

PROHIBITED DEGREES.

See *Marriage*.

PROPERTY LANDLOCKED.

See *Way*, III.—VII.

PROPERTY TAX.

See *Tithe Commutation Rent Charge*, III.

PUBLIC BRIDGE.

See *Bridge*.

QUAKER.

See *Church Rate*, II.

QUARTER SESSIONS.

Appeal to.

Quære, whether on a summary conviction under 39 & 40 *G.* 3. c. 89. s. 18., for unlawful possession of naval stores, where the party is sentenced to imprisonment with hard labour, without a fine being imposed, an appeal to the Quarter Sessions is given by sect. 21? *The Queen v. Willmott*, 27.

Adjournment of.

I. The general power of a Court of Quarter Sessions to adjourn to the next Sessions the hearing of an appeal, where the particular Act giving the appeal does not limit the hearing and determination of it to one Sessions only, extends to cases where the hearing of the appeal has commenced and the evidence is partly before the Court. The Sessions have power, in such a case, to adjourn the further hearing to the next Sessions, for the purpose of additional evidence being procured: or for any cause which, in their discretion, may render the adjournment expedient. *The Queen v. The Guardians of the Cambridge Union*, 61.

II. Sessions may exercise this power of adjournment in appeals under The Lunatic Asylums Act, 16 & 17 Vict. c. 97.; the Act not limiting the hearing and determination to the Sessions for which the appeal is entered, or at which it is first gone into. *Id.*

Case reserved by.

The grounds of removal of a female pauper stated a derivative settlement from her great-grandfather; and alleged an acknowledgment of that settlement by relief given to her great-grandmother, and by a collateral relation having been removed to the parish. On the trial of an appeal at the Quarter Sessions against the order of removal, the respondents offered evidence to shew the removal to the appellant parish of another collateral relation—the wife of a grandson of the common ancestor—on a settlement also derived from him. This evidence was objected to, but received, and the question of its admissibility was reserved for this Court:

1. Held, that the Court of Quarter Sessions were prohibited by stat. 11 & 12 Vict. c. 31. from reserving the above question for the consideration of this Court.

2. Per *Hill* and *Crompton JJ.*, dubitante *Cockburn C. J.*, that the evidence was receivable. *The Queen v. The Inhabitants of Ruyton*, 534.

QUESTIONS TENDING TO CRIMINATE.

See *Witness, Privilege of in not answering.*

RAILWAY COMPANY.

I. A railway Company, carrying on business as common carriers for hire, refused to receive certain goods tendered to them for carriage as such, unless the sender of the goods would sign a condition by which the Company were not to be answerable "for the loss, detention or damage of any package insufficiently or improperly packed, marked, directed or de-

scribed": Held an unjust and unreasonable condition, both at common law and under the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31. *Garton and another v. The Bristol and Exeter Railway Company*, 112.

II. *Semble*, per *Cockburn C. J.*, that a condition imposed by a railway Company carrying on business as common carriers for hire, that "no claim for damage will be allowed unless made within three days after the delivery of the goods, nor for loss unless made within three days of the time that they should be delivered," is unjust and unreasonable.

III. A railway Company, carrying on business as common carriers for hire, refused to receive the goods of *A. B.* on the ground that they were tendered after a quarter past five in the evening, although they did receive the goods of *C. D.* at a later hour: Held, that, in the absence of explanation, this was unlawful conduct in the Company, and *A. B.* having sustained damage in consequence of it, was entitled to recover against them.

IV. A declaration alleged that a railway Company, carrying on business as common carriers for hire, refused to carry certain goods unless the sender of the goods would sign "certain unjust and unreasonable conditions": Held, that this allegation was satisfied by proof that one of the conditions thus required to be signed was unjust and unreasonable. *Id.*

See also *Company, Bristol and Exeter Railway Company*, and *Lands Clauses Consolidation Act.*

RATE.

Church. See *Church Rate.*

Poor.

I. *The Society of Licensed Victuallers*, founded for the purpose of relieving distressed members from its funds, was incorporated by Royal charter. The Society maintained a

school for the education, free of charge, of the children of decayed or deceased licensed victuallers; and possessed a school house and other premises used for that purpose. The charter provided that the management of the Society should be entrusted to a Governor and Committee: and that the members of the Society should meet quarterly, and should have power, at such meetings, to make by-laws. One of these by-laws, so made, provided that these quarterly meetings should be held in the premises of the Society's school, or at such other place as the Governor and Committee might appoint. These meetings were accordingly held on the premises. On appeal by the Society against a poor rate, a general rate for defraying the expenses of the Metropolis Local Management Act, and a sewers rate for defraying the expenses of the main drainage, assessed upon them in respect of the premises in question: Held, that the Society had a beneficial occupation of the premises, and were rateable in respect of them. *The Queen v. The Governor and Committee of The Licensed Victuallers' Society*, 71.

II. Where a beneficed clergyman is compellable by his Bishop to appoint a curate, or under a sense of religious, independent of legal obligation, appoints one, in either case he is entitled, in assessing his tithe commutation rent charge to the poor rate under 6 & 7 W. 4. c. 96., to deduct the salary of the curate from the amount of the rent charge. *Williams, appt., v. The Overseers of Llangeinwen, resps.*, 699.

III. Two districts adjoined each other, and from time immemorial a single rector had been presented, admitted and instituted to them jointly; and it had been the uniform custom to have a single performance of divine service in each every Sunday. The incumbent of the parish voluntarily, but in consequence of a wish expressed by the Bishop to the clergy generally that there should be two performances of Divine service in the churches of the

diocese, introduced the practice of having a morning and evening performance of Divine service at each of the churches, and employed a curate to assist him in the performance of them: held, that the incumbent was entitled to a deduction of the curate's salary from the amount for which he was liable to be rated to the poor rate under 6 & 7 W. 4. c. 96. *Id.*

IV. Concessum, that in that case the incumbent was entitled to a deduction from it for the amount of tenant's property tax, under 16 & 17 Vict. c. 34. *Id.*

V. The parish of W., before the appropriation of the rectory and the endowment of the vicarage, comprised the hamlets of Great W., Little W., B. and D. In Great W. was the mother church. In the hamlet of B. a chapel was built, and it is mentioned as a chapelry to W. in the Ecclesiastical Taxation of Pope Nicholas the Fourth, A.D. 1291; twenty years later Merton College, Oxford, obtained a licence from King Edward II. to appropriate the rectory of W., together with the chapel of B. Two years later the vicarage of W. was endowed, and the vicar was, by the endowment deed, required to cause the chapel of B. to be served with a suitable priest. In 1616 B. had a parsonage house and glebe lands. The chapel of B. was served either by a Fellow of Merton College, or by curates appointed by that College, or by the vicar of W. or his curate. The chapel having fallen into ruins, it was rebuilt in 1693, and the cure thereof restored to the church of W., and an annual stipend granted to the curate out of the appropriate rectory: this ceased probably when an arrangement was made by Merton College that they would give a beneficial lease of the rectorial tithes of the glebe of B. to their senior resident Fellow on condition of his providing for the cure of B. In 1834, Merton College resolved that the lease of the great tithes of B. should be granted to the vicar of W. in augmentation of his benefice. In the records of the diocese, A.D. 1692, B. is termed "the

parochial chapelry of *B.*," but in all other entries in the registry it is styled a chapel to *W.*; except that in the registry of the Consistory Court of *Worcester* of 1714 there is a terrier of the tithes and glebes belonging to the parish of *B.*; and in the Bishop's register there is a register of baptisms, marriages and funerals in the parish of *B.* from 1711 to 1728. For about a century previous to 1847, the cure of *B.* was provided for by the consecutive lessees of the appropriate rectory, and not by the vicar of *W.* The appellant was instituted to the vicarage of *W.* in 1843, and in 1847 received a lease of the glebe of *B.* and rent charge in lieu of rectorial tithes, for twenty-one years, if he should so long continue the resident vicar of *W.*, he covenanting to serve the cure of *B.* either by himself or by a curate, and to discharge the College of the cure, and to pay all rates and assessments payable out of the rectory. A curate, whose stipend was paid by the appellant, performed the parochial duties and services at *B.*: it was impossible for one person devoting his whole time and attention to perform the services required at *W.* and *B.*: held, That in assessing the appellant as owner of the tithe commutation rent charge of *B.* to the poor rate, he was not entitled to any deduction in respect of the stipend of the curate of *B.*, inasmuch as, first, upon the facts stated, there was no such connection between *W.* and *B.* as that they could be considered one benefice, and therefore the appellant was in the position of an incumbent holding two benefices, and thereby bringing upon himself the necessity of employing a curate: and, secondly, the appellant received the tithe rent charge of *B.* as lessee of *Merton College*, with an undertaking to discharge the services at *B.* and not as vicar of *W. Wheeler*, *appt.*, v. *The Overseers of Burnington*, *resps.*, 709.

VI. *Semble*, per *Cockburn C. J.* If in that case *Merton College* received the tithe rent charge of *B.*, they would not be entitled to any deduction in

respect of the stipend of a curate paid by them. *Id.*

VII. Sect. 55 of the Local Government Act, 1858 (21 & 22 *Vict. c.* 98.), which provides that the general district rates under the Act shall be levied "upon the occupier of all such kinds of property as by the laws in force for the time being are or may be assessable to any rate for the relief of the poor," has reference to the description of the property, not to the character of its occupation in the particular instance; and makes assessable to the district rates all property which, from its nature, is *prima facie* assessable to poor rate. *Guardians of Toxteth Park, appts.*, v. *The Local Board of Health of Toxteth Park, resps.*, 167.

VIII. *T.*, an extra parochial place maintaining its own poor, consisted of two districts; one within the borough of *L.*, the other, "the rural" district, not within *L.* The guardians of *T.* built a workhouse and workhouse hospital within the rural district, which were used for the whole, and only for the whole, of *T.* The Local Board of Health for the rural district having made a general district rate for that district: Held, that the guardians of *T.* were liable to assessment, as occupiers of property assessable for the relief of the poor, within the meaning of sect. 55 of stat. 21 & 22 *Vict. c.* 98. *Id.*

Towns Improvement. See *Towns Improvement Clauses Act*.

REAL ESTATE, ABORTIVE SALE OF.

See *Abortive Sale of Real Estate*.

REASONABLE.

Condition.

I. A policy of insurance was entered into with a Company against bodily injury from any railway accident directly affecting the assured while travelling on any line of railway

in *Great Britain or Ireland* by a passengers train propelled by steam power. One of the conditions in the deed of settlement of the Company, which by the terms of the policy was incorporated with it, provided that, before payment of the sum insured by any policy, proof satisfactory to the directors of the Company should be furnished by the claimant of the death or accident, together with such further evidence or information, if any, as the directors should think necessary to establish the claim: held, that this must be understood to mean such evidence or information as the directors might reasonably, and not such as they might unreasonably and capriciously require. *Braunstein v. The Accidental Death Insurance Company*, 782.

II. There was a condition indorsed on the same policy, that in case of difference of opinion as to the amount of compensation payable in any case, the question should be referred to the arbitration of a person to be named by the secretary for the time being of the Master of the Rolls, and all expenses and costs should be subject to the decision of such arbitrator, and the award made on such arbitration was to be taken as a final settlement of the question, and might be made a rule of Court: held, that a reference to arbitration in the manner prescribed was rendered a condition precedent to bringing an action for an injury within the policy. *Id.*

III. A railway Company, carrying on business as common carriers for hire, refused to receive certain goods tendered to them for carriage as such, unless the sender of the goods would sign a condition by which the Company were not to be answerable "for the loss, detention or damage of any package insufficiently or improperly packed, marked, directed or described": Held an unjust and unreasonable condition, both at common law and under The Railway and Canal Traffic Act, 17 & 18 Vict. c. 31. *Garton and another v. The Bristol and Exeter Railway Company*, 112.

RELATIONSHIP.

IV. *Semble*, per *Cockburn C. J.*, that a condition imposed by a railway Company carrying on business as common carriers for hire, that "no claim for damage will be allowed unless made within three days after the delivery of the goods, nor for loss unless made within three days of the time that they should be delivered," is unjust and unreasonable. *Id.*

Time. See *Bankruptcy*.

And probable cause, want of. See *Church Rate*.

RELATIONSHIP.

See *Agreement*, II., and *Marriage*.

REMOVABILITY.

I. A pauper lunatic had resided for more than five years in the respondent parish with her father and mother, when he died, and she continued to reside with her mother in that parish till *October*, 1858, when she was sent to the workhouse, where she remained till the 24th *January*, 1860. In *December*, 1859, her mother went to reside in another parish, but did not acquire any settlement in her own right. On the 24th *January*, 1860, the pauper lunatic was sent from the workhouse to the county lunatic asylum and was confined there until the 25th *April* following, when she was discharged and went to reside with her mother. Upon an appeal against an order of adjudication and maintenance, under stat. 16 & 17 *Vict. c. 97.*, upon the parish in which her father was settled: held that, the pauper lunatic being unemancipated, continued part of her mother's family, and therefore, her mother having ceased to be irremovable, she also ceased to be irremovable, and the order was rightly made. *The Queen v. The Overseers of St. Mary Arches, Exeter*, 890.

II. *Quare*, whether an unemancipated child can acquire a status of irremovability in its own right? *Id.*

REPAIR.

REPAIR.

Of burial ground. See *Burial Ground*.

Of public bridge. See *Bridge*.

REPLICATION ON EQUITABLE GROUNDS.

See *Equitable Grounds, Replication on*.

RESERVOIRS, RATING.

See *Towns Improvement Clauses Act*.

ROYAL EXCHANGE ASSURANCE COMPANY.

I. Stat. 5 & 6 Vict. c. 97. s. 3., which repeals so much of any clause in any Act commonly called public local and personal, or local and personal, or in any Act of a local and personal nature, whereby parties are entitled to plead the general issue only and to give any special matter in evidence, is by its preamble confined to actions "for any matter done in pursuance of or under the authority of the said Acts;" and therefore does not repeal stat. 11 G. 1. c. 30. s. 43., by which *The Royal Exchange Assurance*, and *The London Assurance Corporations* are enabled, in all actions of covenant against them upon any policy, to plead generally that they have not broken the covenants in such policy &c. *Carr and another v. The Corporation of The Royal Exchange Assurance Company*, 966.

II. *Quere*, whether stat. 11 G. 1. c. 30. s. 43. is an Act of a local and personal nature, within stat. 5 & 6 Vict. c. 97.? *Id*.

SAFE PORT, MEANING OF IN CHARTER PARTY.

The defendants chartered a ship to proceed from *England* to a safe port in *Chili*, with leave to call at *Valparaiso*. On her arrival at *Valparaiso*,

3 x 2

SALE OF REAL ESTATE. 1011

the charterers' agent named the port of *Carrisal Bajo* as the port of discharge, and directed the master to proceed thither. At the time *Carrisal Bajo* was named as the port of discharge, that port was closed by order of the *Chilian* government, and the ship could not proceed thither without confiscation. The ship was consequently detained for some time at *Valparaiso*, and, on the port being opened, sailed for *Carrisal Bajo* and there discharged her cargo. Held, that the charterers were liable in damages to the shipowner for the detention of the ship at *Valparaiso*, as they had not named a "safe port" within the meaning of the charter-party. *Ogden v. Graham and another*, 773.

SALE OF REAL ESTATE.

See *Abortive Sale of Real Estate*.

SCHOOLHOUSE.

See *Rate, Poor, I*.

SCINTILLA OF EVIDENCE.

Per *Crompton J.* The doctrine that if there is only a scintilla of evidence for the jury the verdict of the jury is not to be disturbed is now exploded. *Mellors v. Shaw and Unwin*, 437.

SECURITY FOR BRINGING ACTION IN SUPERIOR COURT.

See *County Court, II*.

SETTLEMENT.

See *Pauper*.

SEWERS.

The Metropolitan Local Management Act, 18 & 19 Vict. c. 120. s. 69., enacts, that the vestry of every parish

mentioned in Schedule A. shall make such sewers as may be necessary for effectually draining their parish: provided that no new sewer shall be made without the previous approval of the Metropolitan Board of Works. Mandamus to the vestry of one of these parishes, commanded them to make such sewers as might be necessary for draining a particular part of the parish, and to take all necessary steps in that behalf: held defective: first, because it did not shew a present duty to make the sewers; secondly, because it ordered the defendants to make them without shewing that the approval of the Metropolitan Board had been obtained. *The Queen v. The Vestry of St. Luke's, Chelsea*, 903.

SHAREHOLDER.

See *Company*.

SHIPPING.

Agent. See *Broker*.

Documents.

Defendants had become responsible, as del credere agents, for the purchase of a cargo of wheat of from 1800 to 2000 quarters, to be shipped at the price of 50s. per quarter free on board at *Taganrog*, "and including freight and insurance to any safe port in the United Kingdom." "Payment cash in *London* in exchange for shipping documents." Plaintiffs tendered the following shipping documents of a cargo answering the description in the contract: a charterparty; a bill of lading and provisional invoice, in both of which the cargo was stated to be 1850 quarters, at 50s. per quarter, 4626*l.*, less freight, at 10s. 9*d.* per quarter, 1001*l.* 10s.; and a policy of insurance effected on the cargo valued at 3600*l.* On behalf of the plaintiffs evidence was given, which was not contradicted, that the policy tendered was sufficient to protect the interest of the shipper of the cargo at the time of shipment. In an action against the defendants for not pay-

STATUTE OF FRAUDS.

ing or procuring from their principal payment of the price of the cargo, they pleaded that plaintiffs were not ready and willing to tender, nor did they tender, "the usual shipping documents" according to the contract. Held, that the plaintiffs had so tendered: and they were not bound to tender, as a "shipping document," within the meaning of the contract, a policy covering the full amount of the buyers' risk as it appeared by the provisional invoice and bill of lading. *Tamvaco and others v. Lucas and others*, 185.

STATUTE OF FRAUDS.

I. A contract to make a set of artificial teeth is a contract for the sale of goods, wares or merchandizes, within the 17th section of the Statute of Frauds, 29 Car. 2. c. 3. *Lee v. Griffin*, 272.

II. A. ordered of B. a set of artificial teeth, which were by the terms of the contract to be fitted to her mouth; before they were so fitted A. died. Held, that B. could not sue A.'s executor in an action for work and labour done, and materials provided for his testatrix. *Id.*

III. In the preceding case, as soon as the teeth were ready, B. wrote to A., requesting her to appoint a day when he could see her for the purpose of fitting them, to which she replied as follows:—"My dear Sir. I regret, after your kind effort to oblige me, my health will prevent my taking advantage of the early day. I fear I may not be able for some days. Yours &c." Held, that there was no sufficient memorandum of a contract within the meaning of that section. *Id.*

IV. Per *Crompton and Blackburn JJ.* In order to decide whether a contract be for work and labour, or for the sale of a chattel, the value of the skill and labour, as compared with that of the material supplied, is not a criterion. *Id.*

V. In order to satisfy the Statute

of Frauds, 29 *Car. 2. c. 3. s. 17.*, there must be both an acceptance of the goods, or part of them, and an actual receipt of them. *Cusack and others v. Robinson*, 299.

VI. In order to satisfy the same enactment it is not necessary that the acceptance of the goods should follow or be contemporaneous with the receipt of them; an acceptance prior to the receipt will suffice. *Id.*

VII. In an action for goods sold and delivered, it appeared that the defendant went to the plaintiffs at *Liverpool*, and said he wanted to buy from 150 to 200 firkins of butter. He then went with one of them to their cellar, where he was shewn a lot of 156 firkins, six of which he opened and inspected. Afterwards, on the same day, the plaintiffs and defendant made a verbal agreement, by which the defendant agreed to buy that specific lot at 77s. per cwt. When the price had been agreed on, the defendant took a card on which his name and address in *London* were written "*Edmund Robinson, 1, Wellington Street, London Bridge, London,*" and wrote on it "156 firkins butter to be delivered at *Fenning's Wharf, Tooley Street.*" He gave this to the plaintiffs, and at the same time said that his agents, Messrs. C., at *Liverpool*, would give directions, how the goods were to be forwarded to *Fenning's Wharf*. The plaintiffs, by C.'s directions, delivered the butter to P.'s carts to be forwarded to the defendant at *Fenning's Wharf*. The plaintiff sent an invoice, dated the 25th *October* 1860, to the address on the defendant's card. He received in answer a letter purporting to come from a clerk in the defendant's office, acknowledging the receipt of the invoice, and stating that, on the defendant's return, he would no doubt attend to it. A clerk at *Fenning's Wharf* proved that Messrs. *Fennings* stored goods for their customers, and had a butter warehouse; that the defendant had used the warehouse for fifteen years, and was in the habit of keeping his butters there till he sold them. On the 26th *October*

P. & Co. had delivered a part of the 156 firkins in question at the warehouse, and delivered the residue afterwards. The witness could not say whether any one came to inspect them or not, but he proved that they were delivered up by *Fenning* to *P. & Co.* under a delivery order from the defendant, dated 27th *October*. Held that there was evidence of an acceptance and actual receipt sufficient to satisfy the statute. *Id.*

SUMMONS.

See *Bastardy*.

Writ of, omission to reseal.

On the day of the expiration of a writ of summons issued under The Common Law Procedure Act, 1852 (15 & 16 *Vict. c. 76.*), the plaintiffs' attorney attended at the office for the purpose of having it renewed, and paid the fee; but being suddenly called away omitted to get the seal impressed in pursuance of sect. 11, and did not discover the mistake until it was too late to keep the writ alive by resealing, so as to save the Statute of Limitations: held, that the Court had no power to direct the officer to impress the seal on the writ as of the day when the attorney applied to have it renewed; but that it would have been otherwise if the omission to reseal the writ had been occasioned by a fault of the officer of the Court. *Nazer and others v. Wade and another*, 728.

SUMMARY CONVICTION.

See *Naval Stores*.

SUPPORT OF, RIGHT TO.

See *Mine*.

TENANTS' PROPERTY TAX.

See *Tithe Commutation Rent Charge*, III.

TITHE COMMUTATION RENT CHARGE.

I. Where a beneficed clergyman is compellable by his Bishop to appoint a curate, or under a sense of religious, independent of legal obligation, appoints one, in either case he is entitled, in assessing his tithe commutation rent charge to the poor rate under 6 & 7 W. 4. c. 96., to deduct the salary of the curate from the amount of the rent charge. *Williams, appellant, v. The Churchwardens and Overseers of the parish of Llangeinwen, respondents, 699.*

II. Two districts joined each other, and from time immemorial a single rector had been presented, admitted and instituted to them jointly; and it had been the uniform custom to have a single performance of Divine service in each every *Sunday*. The incumbent of the parish voluntarily, but in consequence of a wish expressed by the Bishop to the clergy generally that there should be two performances of Divine service in the churches of the diocese, introduced the practice of having a morning and evening performance of Divine service at each of the churches, and employed a curate to assist him in the performance of them: held, that the incumbent was entitled to a deduction of the curate's salary from the amount for which he was liable to be rated to the poor rate under 6 & 7 W. 4. c. 96. *Id.*

III. Concessum, that the incumbent was entitled to a deduction from it for the amount of tenant's property tax, under 16 & 17 Vict. c. 34. *Id.*

IV. The parish of *W.*, before the appropriation of the rectory and the endowment of the vicarage, comprised the hamlets of *Great W.*, *Little W.*, *B.* and *D.* In *Great W.* was the mother church. In the hamlet of *B.* a chapel was built, and it is mentioned as a chapelry to *W.* in the Ecclesiastical Taxation of Pope *Nicholas* the Fourth, A.D. 1291: twenty years later *Merton College, Oxford*, obtained a

licence from King *Edward* II. to appropriate the rectory of *W.*, together with the chapel of *B.* Two years later the vicarage of *W.* was endowed, and the vicar was, by the endowment deed, required to cause the chapel of *B.* to be served with a suitable priest. In 1616 *B.* had a parsonage house and glebe lands. The chapel of *B.* was served either by a Fellow of *Merton College*, or by curates appointed by that College, or by the vicar of *W.* or his curate. The chapel having fallen into ruins, it was rebuilt in 1693, and the cure thereof restored to the church of *W.*, and an annual stipend granted to the curate out of the appropriate rectory: this ceased probably when an arrangement was made by *Merton College* that they would give a beneficial lease of the rectorial tithes of the glebe of *B.* to their senior resident Fellow on condition of his providing for the cure of *B.* In 1834, *Merton College* resolved that the lease of the great tithes of *B.* should be granted to the vicar of *W.* in augmentation of his benefice. In the records of the diocese, A.D. 1692, *B.* is termed "the parochial chapelry of *B.*," but in all other entries in the registry it is styled a chapel to *W.*; except that in the registry of the Consistory Court of *Worcester* of 1714 there is a terrier of the tithes and glebes belonging to the parish of *B.*; and in the Bishop's register there is a register of baptisms, marriages and funerals in the parish of *B.* from 1711 to 1728. For about a century previous to 1847, the cure of *B.* was provided for by the consecutive leasees of the appropriate rectory, and not by the vicar of *W.* The appellant was instituted to the vicarage of *W.* in 1843, and in 1847 received a lease of the glebe of *B.* and rent charge in lieu of rectorial tithes, for twenty-one years, if he should so long continue the resident vicar of *W.*, he covenanting to serve the cure of *B.* either by himself or by a curate, and to discharge the College of the cure, and to pay all rates and assessments payable out of the rectory. A curate, whose stipend was paid by the appellant, performed the parochial duties and services at *B.*: it was impossible

TITLE.

for one person devoting his whole time and attention to perform the services required at *W.* and *B.*: held, That in assessing the appellant as owner of the tithe commutation rent charge of *B.* to the poor rate, he was not entitled to any deduction in respect of the stipend of the curate of *B.*, inasmuch as, first, upon the facts stated, there was no such connection between *W.* and *B.* as that they could be considered one benefice, and therefore the appellant was in the position of an incumbent holding two benefices, and thereby bringing upon himself the necessity of employing a curate: and, secondly, the appellant received the tithe rent charge of *B.* as lessee of *Merton College*, with an undertaking to discharge the services at *B.* and not as vicar of *W. Wheeler*, appellant, *v. The Churchwardens and Overseers of Burmington, respondents*, 709.

V. Semble, per *Cockburn C. J.* If in that case *Merton College* received the tithe rent charge of *B.*, they would not be entitled to any deduction in respect of the stipend of a curate paid by them. *Id.*

TITLE.

See *Abortive Sale of Real Estate*.

TOLL.

See *Turnpike Road*, II. and III.

Exemption from.

I. Any carriage *bonâ fide* employed in conveying volunteer infantry to, or bringing them back from, a place of military exercise, inspection or review, or on other public duty, is exempt from toll by virtue of The General Turnpike Act, 3 G. 4. c. 126. s. 32. *Tunstall, appt., v. Jane Lloyd, respt. Stephenson appt., v. Taylor, respt.*, 95.

II. In order to enjoy that immunity the carriage must be employed, not

TOWN CORPORATE. 1015

perhaps *exclusively*, but at all events *substantially*, for the conveyance of volunteers: per *Cockburn C. J. Id.*

III. A volunteer corps were assembled at *K.* by regimental order for "marching out drill," and did march out, and were afterwards dismissed at the head quarters of the regiment. Three members of the corps then hired a hackney carriage, and proceeded towards home, in doing which it was necessary to pass through a turnpike. No one else was in the carriage, and the volunteers were dressed in their uniform, and had their arms and accoutrements according to the regulations of the corps: held, that the carriage was exempt from toll under The General Turnpike Act, 3 G. 4. c. 126. s. 32. *Id.*

TOWN CORPORATE.

Where a borough named in Schedule A. to stat. 5 & 6 W. 4. c. 76. has a separate commission of the peace, but no separate Court of Quarter Sessions, the county justices have exclusive jurisdiction to grant alehouse licenses within the borough under stat. 9 G. 4. c. 61. *Candlish and another v. Simpson and another*, 357.

TOWNS IMPROVEMENT CLAUSES ACT.

The Birmingham Waterworks Company, incorporated by stat. 7 G. 4. c. cix., were empowered by that statute to construct waterworks, and to supply, by means of aqueducts, pipes, mains and reservoirs, the borough of *Birmingham &c.* with water. The Company executed the necessary works, and made a large reservoir without, and a small reservoir within, the borough; the latter of which was supplied with water forced from the former through mains and pipes under the ground, thereby supplying a small portion of the borough with water. By 18 Vict. c. xxxiv., embodying The Waterworks Clauses Act, 10 & 11 Vict. c. 17., the

former Act was repealed, and the Company empowered to form other reservoirs, obtain water from fresh sources, and erect additional works. The Company proceeded to execute new works; and constructed new reservoirs outside the borough, and laid down new mains and pipes for carrying the water from them into the old one without the borough, and thence into and through the borough: the streams supplying the reservoirs being open streams and brook courses running over the surface of the ground; the reservoirs both within and without the borough being wholly uncovered. By The *Birmingham Improvement Act*, 14 & 15 *Vict. c. xciii.*, with which a considerable part of The Towns Improvement Clauses Act, 10 & 11 *Vict. c. 34.*, is incorporated, the town council are authorized to make and levy a rate, called "The Borough Improvement Rate," upon "every person who occupies any house, shop, warehouse, counting house, coach house, stable, cellar, vault, building, workshop, manufactory, garden, land or tenement whatsoever except as hereinafter excepted, within the limits of that Act, according to the full net annual value thereof respectively." And by clause 129 it is provided that "the occupiers of any land covered with water or used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be rated in respect of the same to the rates authorized to be levied by this Act at one fourth part only of the net annual value." Held,

1. That the reservoir within the borough was rateable to the borough rate at only one fourth part of its net annual value.

2. That the pipes and mains of the Company within the borough were rateable to the borough rate to the full extent, and not merely to one fourth part of their net annual value as "land covered with water." *The Queen v. The Birmingham Waterworks Company*, 84.

TRIBUNALS ABROAD.

See *Jurisdiction*, II. III. IV.

TURNPIKE ROAD.

I. The 4 & 5 *Vict. c. 59.* applies to turnpike roads not in existence at the time when it was passed. *The Trustees of The Sunk Island Turnpike Road, appts., v. The Surveyors of the Highways of Patrington, resps.*, 747.

II. A turnpike trust is not the less a turnpike trust within that Act because the funds of it are derived from other sources than from tolls taken on the road. *Id.*

III. A turnpike trust may be within the provisions of stat. 4 & 5 *Vict. c. 59.*, although the road was made and the tolls are taken under a public general statute. *Id.*

UNION.

See *Gilbert's Act*.

VENDOR AND VENDEE.

See *Broker and Construction of Contract*.

VESTRY.

See *Metropolis Local Management Acts*.

Voting in.

Where a person is assessed to the poor rate in respect of his own property, and is also executor of a person whose executors are assessed in respect of property of the deceased, he is entitled to vote at a vestry, under 58 *G. S. c. 69.*, if the two assessments make up the required amount. *The Queen v. Kirby*, 647.

VOLUNTEERING ASSISTANCE.

See *Injury to Person Volunteering Assistance*.

VOLUNTEERS.

VOLUNTEERS.

See *Toll, Exemption from.*

WANT OF REASONABLE AND PROBABLE CAUSE.

See *Church Rate.*

WARRANTY.

By memorandum of charter-party dated *London*, it was agreed between *A. B.*, therein described as "owner of the good ship or vessel called the *M.*, of 420 tons or thereabouts, now in the port of *Amsterdam*" and, *C. D.*, that the said ship, being tight, staunch, strong, and every way fitted and ready for the voyage, should "with all possible despatch proceed direct to *N. &c.*" In an action by the ship-owner against the charterer for not loading the agreed cargo: Held; per *Cockburn C. J.*, *Crompton and Mellor JJ.*, dissentiente *Wightman J.*; that the words "now in the port of *Amsterdam*," did not amount to a warranty, or constitute a condition precedent to the contract, that the ship was there at the time of making the charter-party. *Behn v. Burness*, 877.

See also *Marine Insurance.*

WAY.

I. On a severance of two tenements, no right to use ways, which during the unity of possession have been used and enjoyed in fact, passes to the owner of the dissevered tenement, unless there be something in the conveyance to shew an intention to create the right to use these ways *de novo*. *Pearson v. Spencer*, 571.

II. The same rule in this respect applies to a will as to a deed. *Id.*

III. Where property devised or granted is landlocked, and there is no other way of getting at it without being a trespasser, so that it cannot

VOL. I.

3 Y

WHITECHAPEL, &c. 1017

be enjoyed without a way of some sort over the land of the testator or grantor, a way of necessity is created *de novo*. *Id.*

IV. The ground on which the way of necessity is created is, that a convenient way is implied by grant as a necessary incident. *Id.*

V. The way of necessity once created, must remain the same way as long as it continues at all. *Id.*

VI. Where a portion of land is devised in such a manner as to be landlocked, the extraneous facts shewing that by that devise the testator intended to create a convenient way of some sort over adjoining property of his own, the line of the way must be discovered from the language of the will, understood with reference to the state of the property. *Id.*

VII. *Quere*, in what manner the way is to be set out, if the premises before severance were so occupied as to afford no indication of what was the usual way in the testator's time, and the devise is silent on the subject? *Id.*

WHITECHAPEL IMPROVEMENT ACT.

See *Local and Personal Act.*

WITNESS.

Contradicting.

I. A statement to contradict the evidence of a witness under The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125.), sect. 22, may be contained in a series of documents, not one of which, taken by itself, would amount to a contradiction of his evidence. *Jackson and Wife and others v. Thomason*, 745.

II. *Quere*, per *Cockburn C. J.*, whether, independent of that statute, if a party, in order to prove a will, calls an attesting witness, who gives evidence invalidating the will, it is not

B. & S.

competent to the party calling him to give evidence to discredit him, as, for instance, by shewing that he has been corrupted by the heir at law? *Id.*

Privilege of, in not answering.

I. A merely remote and naked possibility of legal peril to a witness from answering a question is not sufficient to entitle him to the privilege of not answering. To entitle him to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which he is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. Moreover, the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. *The Queen v. Boyes*, 311.

II. The position, that the witness is sole judge as to whether his evidence would bring him into danger of the law, and that the statement of his belief to that effect, if not manifestly made *malâ fide*, should be received as conclusive, denied by this Court. *Id.*

III. Still, if the fact of the witness

being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question. *Id.*

IV. On the trial of an information for bribery, filed by *The Attorney General* by the direction of the House of Commons, one of the persons charged in the information to have been bribed by the defendant was called as a witness; and, on his declining to answer any questions with respect to the alleged bribery, the counsel for the Crown handed him a pardon under the Great Seal; which the witness accepted, but still declined to answer: held, that the possible risk of impeachment by the House of Commons, notwithstanding the pardon under the Great Seal, according to the Act of Settlement, 12 & 13 W. 3. c. 2. s. 3., was not a sufficient ground to entitle him to the privilege of not answering. *Id.*

WORK AND LABOUR.

See *Statute of Frauds*, II., IV.

WORKHOUSE.

See *Rate, Poor*, VII.

WRIT OF SUMMONS.

Omission to reseal. See *Summons*.

THE END.

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